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LATE NATIONAL INSURANCE CLAIMS: CAUSE FOR DELAY

CASE law is made daily by administrative tribunals just as much as by the traditional courts. A deputy insurance commissioner has recently drawn attention to this in a lecture,[1] surveying decisions under the national insurance and industrial injuries schemes. The decisions are of importance to vast numbers of people, and nearly everyone is a potential claimant. The results and the reasoning leading to them ought to be subjected to the same intense scrutiny in legal periodicals as is accorded to law-reports cases. As decided cases become more and more myriad it becomes more and more difficult to make a start. There are many problems calling for attention under the national insurance and industrial injuries schemes alone. One of the most frequently occurring is that of determining when a late claim should be allowed.

Among the commonest grounds for disallowing claims to insurance benefit is that the claim was not made within the prescribed time. While the prescribed time varies from one type of benefit to another, the provision is common to all that on principle a late claim results in forfeiture of benefit. But under the national insurance scheme—

> "If in any case the claimant proves . . . (*b*) . . . that throughout the period between the earlier date and the date on which the claim was made there was good cause for delay in making such claim . . . he shall not . . . be disqualified . . . for receiving any benefit to which he would have been entitled if the claim had been made on the said earlier date." [2]

Similarly, benefit under the industrial injuries scheme must be claimed within the prescribed time—

[1] Safford, "The Creation of Case Law" (1954) 17 M.L.R. 197.

[2] S.I. 1948, No. 1041, reg. 11 and 2nd Sched., as enacted by S.I. 1952, No. 1207, reg. 3 and Sched. A, made under the National Insurance Act, 1946, s. 28 (1). The equivalent provision in force in Northern Ireland is S.R. & O. (N.I.), 1948, No. 196, reg. 11 and 2nd Sched., as enacted by S.R. & O. (N.I.), 1952, No. 46, reg. 2 and Sched. A, made under the National Insurance Act (N.I.), 1946, s. 27 (2).

> "Provided that if in any case the claimant proves that there was reasonable cause for the failure to make the claim before the date on which it was made, the prescribed time for making that claim shall be extended to the date on which the claim is made." [3]

The administrative tribunals under the schemes—ultimately the commissioner in Great Britain and the umpire in Northern Ireland—are left to determine what amounts to good cause or reasonable cause for the failure to claim in time. It is proposed first to examine what they have decided, and then to consider whether any criticisms of the decisions ought to be made.

General Formula

Commissioners have evolved a general formula as to the meaning of "good cause" for delay. In C.S. 371/49, the commissioner said: "It will be observed that the expression used is 'good cause,' not 'a good excuse.' 'Good cause' means, in my opinion, some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did." This observation, made on a claim for sickness benefit, has been adopted as to unemployment benefit [4] and death grant.[5] It is doubtless an approach which is common to all benefits. Moreover, in R(U) 6/52, the commissioner thought there was no distinction between good cause (national insurance) and reasonable cause (industrial injuries).

In Texas, where the expression in the Workmen's Compensation Act is "good cause," ". . . all that is required of an injured employee is that he prosecute his claim for compensation with that degree of diligence which an ordinary man, situated as he is, would exercise under the same or similar circumstances." [6]

The Northern Ireland attitude seems to be similar to that in Great Britain, if not expressed in identical language. On a claim for sickness benefit—5/53 (S.B.)—the umpire said: "When considering whether there is good cause for failure to make the claim, it is necessary to find something in the circumstances which prevents or precludes the claimant from making the claim in time or which involves a difficulty in so claiming which would reasonably be regarded as insurmountable by the claimant."

[3] S.I. 1948, No. 1362, reg. 12 and 2nd Sched., as enacted by S.I. 1952, No. 1208, reg. 3 and Sched. A, made under the National Insurance (Industrial Injuries) Act, 1946, s. 32 (2). The equivalent provision in force in Northern Ireland is S.R. & O. (N.I.), 1948, No. 204, reg. 12 and 2nd Sched., as enacted by S.R. & O. (N.I.), 1952, No. 118, reg. 3 and Sched. A, made under the National Insurance (Industrial Injuries) Act (N.I.), 1946, s. 32 (2).

[4] R(U) 6/52.

[5] R(G) 9/52, a decision of a full tribunal of commissioners.

[6] 78 A.L.R. 1252. And see Kermickel, "Workmen's Compensation—Court's Construction of 'Good Cause'" (1953) 5 Baylor L.R. 396.

In an earlier unemployment benefit case—49/48 (U.B.)—the Northern Ireland umpire had expressed the opinion that "good cause" under the 1946 Act meant the same as it had been interpreted to mean under the old Unemployment Insurance Acts. He then gave a summary based on a 1931 Great Britain unemployment insurance case: 788/31 (U). Something in the nature of a praetorian edict fell from the Northern Ireland umpire at about the same time in a sickness benefit case—488/48 (S.B.), where he made a general survey of good cause.

The commissioner in Great Britain has never gone as far as the Northern Ireland umpire [7] in holding that the rules hammered out under the old legislation apply under the 1946 Acts. He has applied the old insurance principles in unemployment benefit [8] and maternity allowance [9] cases, and has applied workmen's compensation principles in industrial injury cases,[10] but has never said that all the old principles survived. Moreover, in R(U) 6/52, the commissioner said that while good cause and reasonable cause were identical to each other, they were not identical to reasonable cause under the Workmen's Compensation Acts.

The Decisions

The actual decisions on what amounts to good cause or reasonable cause for delay can be arranged under certain convenient headings.

Deliberate election not to claim

On principle, when a person knows he could claim and decides not to, there is not good cause for delay in claiming if he changes his mind. This has been laid down in cases on sickness benefit,[11] and was the doctrine with regard to reasonable cause of the workmen's compensation cases.[12] Similar principles have been applied

7 49/48 (U.B.).
8 C.U. 78/49; R(U) 34/51.
9 C.W.G. 2/49.
10 C.I. 273/50.
11 See C.S. 537/49; C.S. 554/49; R(S) 19/52; R(S) 19/53; 951/48 (S.B.) (Northern Ireland).
12 *Webster* v. *Cohen Bros.* (1913) 6 B. 92; *Abel* v. *Estler Bros.* (1919) 12 B. 184; *Lingley* v. *Thomas Firth & Sons, Ltd.* [1921] 1 K.B. 655; *Gibbard* v. *Thomas Tyrer & Co., Ltd.* (1922) 15 B. 236; *Livingstone* v. *Summerlee Iron Co., Ltd.* (1922) 15 B. 296 (Court of Session); *Johnson* v. *Harland & Wolff, Ltd.* (1923) 16 B. 164; *Aitken* v. *Hemsley* (1926) 19 B. 88; *Atherton* v. *Chorley Colliery Co., Ltd.* (1926) 19 B. 314; *Drewett* v. *Britannia Assurance Co., Ltd.* (1927) 20 B. 434; *Soyer* v. *Johnson, Matthey & Co.* (1927) 20 B. 504; *Brown* v. *Aveling & Porter, Ltd.* (1929) 22 B. 165; *Sharrod* v. *Warwickshire Coal Co., Ltd.* (1929) 22 B. 599; *Halsey* v. *Erith Oil Works* (1930) 23 B. 1; *White* v. *Leicestershire Colliery & Pipe Co., Ltd.* (1932) 25 B. 189 (H.L.); *Owen* v. *John Baker & Bessemer, Ltd.* (1932) 25 B. 339; *Elliott* v. *Great Northern Ry. (Ireland)* (1934) 69 I.L.T.R. 3 (C.A., Northern Ireland); *Taylor* v. *Wood* (1935) 28 B. 287; *Holborough* v. *United Dairies (London), Ltd.* (1937) 30 B. 272; *Hodge* v. *Wakefield Trinity Football Club* (1937) 30 B. 359; *Ashton* v. *L.N.E. Ry.* (1941) 34 B. 202; *Macdonald* v. *Flynn* (1944) 37 B. 12; *Stevens* v. *London Electricity Board* (1949) 41 B. 294. And see *Rankine* v. *Alloa*

in such cases in other countries.[13] It does not matter why the insured person made the decision, whether through thoughtlessness, hope that the sickness would be over too quickly to make it worth while bothering ministry officials—though a slightly more lenient attitude on this point seems to be taken in New South Wales [14] and possibly also in Victoria [15]—a desire to save the insurance fund, a wish not to antagonise his employer (under workmen's compensation), or for any other reason.

In C.S. 371/49, the claimant, who was employed by British Railways, thought she would receive full wages during sickness, as had happened before. When she discovered her mistake, she made a late claim for sickness benefit. This was disallowed on the ground that she had no good cause for her delay.[16] In 1/52 (S.B.) the employer was in the habit of paying full wages for periods of sickness, and the claimant employee had to sign an undertaking not to claim sickness benefit. Later, the claimant received a letter saying that as from a year previously she was not entitled to sick leave on full pay. The Northern Ireland umpire held there was good cause for delay in respect of sickness during that time.

There appears to be no decision on the situation where an employer does pay full wages for a period during sickness, and then stops while the employee is still ill, thus causing him to make a late claim. In workmen's compensation cases, however, there was held in those circumstances to be reasonable cause for the delay in claiming. In *Luckie* v. *Merry*,[17] a workman who was injured

Coal Co., Ltd. (1904) 6 F. 375 (Court of Session); *Bedford* v. *Bell & Whinney, Ltd.* (1933) 26 B. 161; *Phillips* v. *G. I. Sidebottom & Co., Ltd.* (1934) 27 B. 382. *Cf. Harris* v. *James Howden & Co. (Land), Ltd.* [1939] 3 All E.R. 34.

In this article the abbreviation "B." stands for Butterworth's *Workmen's Compensation Cases*. All workmen's compensation cases cited are decisions of the English Court of Appeal unless the contrary is indicated.

13 New South Wales: *Vardy* v. *South Clifton Coal Mining Co., Ltd.* (1932) 22 Aust.Dig. 1271; *McNellee* v. *Davison* (1934) 29 Aust.Dig. 459; *Day* v. *Government Printer* (1935) 29 Aust.Dig. 460; *Garratt* v. *Tooheys, Ltd.* [1950] Aust.Dig. 562. Western Australia: *Benison* v. *Booty* (1924) 27 W.A.L.R. 3. New Zealand: *McCarthy* v. *Union Steamship Co. of New Zealand, Ltd.* [1916] N.Z.L.R. 1154. Maine ("unforeseen cause"): 78 A.L.R. 1254. Oklahoma ("sufficient reason"): 92 A.L.R. 510; *Ford Motor Co.* v. *Hunt* (1930) 78 A.L.R. 1227. Texas ("good cause"): 145 A.L.R. 1288; Kermickel, *op. cit.*, note 6, *ante*.

14 *Butt* v. *John W. Eaton, Ltd.* (1920) 29 C.L.R. 126 (High Court).

15 *Williams* v. *Victorian Railway Commissioners* (1939) 29 Aust.Dig. 453.

16 See also C.S. 537/50; 488/48 (S.B.) (Northern Ireland); 483/48 (S.B.) (Northern Ireland).

17 [1915] 3 K.B. 83. And see *King* v. *Port of London Authority* [1920] A.C. 1 (H.L.); *Hillman* v. *L.B. & S.C. Ry.* [1920] 1 K.B. 284; *Shotts Iron Co., Ltd.* v. *Fordyce* [1930] A.C. 503 (H.L.); *Maynard* v. *Bercovitch* (1932) 25 B. 71; *Cartlidge* v. *Shelton Iron, Steel & Coal Co., Ltd.* (1934) 27 B. 136; 92 A.L.R. 509 (Texas). *Cf. Healy* v. *Galloway* (1906) 41 I.L.T.R. 5 (C.A., Ireland); *Lynch* v. *Marquis of Lansdowne* (1913) 48 I.L.T.R. 89 (*ibid.*); *Allen* v. *Hoey* (1914) 49 I.L.T.R. 39 (*ibid.*); *Kenny* v. *Alliance and Dublin Consumers' Gas Co., Ltd.* (1923) 57 I.L.T.R. 157 (C.A., Irish Free State); *Drewett* v. *Britannia Assurance Co., Ltd.* (1927) 20 B. 434; *Soyer* v. *Johnson, Matthey & Co.* (1927) 20 B. 504.

reported the accident to his employer, who told him to potter around on full pay till he was better. The workman did so, and gradually got back to almost his old work, when he was dismissed for misconduct unconnected with the accident. It was held that there was reasonable cause for a late claim. In *Harper* v. *Harper*,[18] it was held that receipt of an *ex gratia* payment for a time constituted reasonable cause for delay in claiming workmen's compensation. The Supreme Court of the Irish Free State, in *Marron* v. *Louth C. C.*,[19] held that being engaged in (unsuccessful) negotiations for a settlement was reasonable cause for making a claim out of time.

Another class of case is that where the insured person thinks the misfortune giving rise to the right to benefit will be so short-lived that claiming is not worth while. In C.S. 596/49, the claimant had originally decided not to claim sickness benefit because he thought he would get better quickly. When he turned out to be wrong and claimed, he was held not to have had good cause for his delay. A similar decision was given—4/52 (S.B.)—in Northern Ireland against a man who delayed claiming because he kept hoping to be cured. But a more lenient view seems sometimes to have been taken of workmen's compensation. In *Moore* v. *Naval Colliery Co., Ltd.*,[20] it was held that hope of a cure was reasonable cause for delay where the workman did not intend to claim if his hope materialised. In R(U) 34/51, a man was held not to have good cause for delay in claiming unemployment benefit by virtue of mistakenly expecting to be out of work for only one day.

Finally, there is the case where a person intends to claim but waits until he has cleared up some preliminary issue. In 5/53 (S.B.),[1] a claim for sickness benefit in Northern Ireland failed for tardiness where the claimant complied with requirements by his employer and friendly society that they see the medical certificate before it was sent to the ministry. Neither this nor the expense of obtaining a second certificate was held to amount to good cause for the delay.[2]

Physical incapacity to claim

If a person is too ill to attend to claiming he has good cause for delay. This is agreed by all the authorities, whether under the

[18] [1916] 2 K.B. 811.

[19] (1938) 72 I.L.T.R. 101.

[20] (1915) 5 B. 87. *Cf. McNulty* v. *County Donegal Joint Railways Committee* [1943] Ir.R. 549 (Supreme Court, Irish Free State). See also notes 14 and 15, *ante*.

[1] And see 899/49 (S.B.) (Northern Ireland).

[2] Cases falling under this heading were dealt with in the same way under the old unemployment insurance legislation: see 262/30; 1822/30; 7592/30; 10427/30; 11513/30; 788/31; 15453/31; 19970/32; 1904/36; 2942/36; 3104/38; 118/42 and 396/43 (Northern Ireland). *Cf.* 2339/34 (Northern Ireland).

national insurance scheme in Great Britain [3] or Northern Ireland,[4] under our old Workmen's Compensation Acts,[5] or under existing workmen's compensation legislation abroad.[6]

In C.S. 51/49, a claimant in hospital for a very serious operation was held to have good cause for delay in claiming sickness benefit. In R(S) 21/54, the claimant for sickness benefit lived alone; she was new to the district and did not know where to send her medical certificate; she was being helped out only by a neighbour of slight acquaintance; she had lost her voice; messages she sent were not delivered; all these circumstances of worry added to her illness. Good cause was found.

The Court of Session, on the other hand, in a case [7] under the Employers' Liability Act, 1880, had held there was no reasonable excuse for delay where a widow claiming in respect of the death of her husband was in a disturbed state of mind on account of the accident. In another such case [8] the same court held there was no reasonable excuse where the claimant, seeking compensation for the death of his son, was ignorant, old and illiterate.

Defective mode of claiming

Ignorance as reasonable or good cause must be considered in detail separately, as must the allied subject of acting on misguided advice. A defective claim may not be wholly ineffectual. In C.S. 33/49, it was held that if a person notified the ministry of his claim, and the ministry treated him as a claimant, that was good cause for delay in making a formal claim.[9] In C.S. 613/49 the delay of medical certificates in the post was held good cause

[3] Sickness benefit: C.S. 51/49; C.S. 537/49; C.S. 42/50; R(S) 3/53; R(S) 9/54; R(S) 12/54; R(S) 21/54; widow's pension: C.G. 153/49; industrial injury benefit: R(I) 43/55.

[4] Sickness benefit: 488/48 (S.B.); 287/49 (S.B.); 36/51 (S.B.); death grant: 2/49 (D.G.).

[5] *Sanderson* v. *Parkinson & Sons, Ltd.* (1913) 6 B. 648; *Maund* v. *Barton* (1924) 17 B. 131; *Gill* v. *Owners of Ship "Boniface"* (1932) 25 B. 346; *Lomas* v. *Park Hall Colliery Co., Ltd.* (1935) 28 B. 313; *Ellison* v. *Calvert & Heald* [1936] 3 All E.R. 467 (H.L.). *Cf. White* v. *Leicestershire Colliery & Pipe Co., Ltd.* (1932) 25 B. 189.

[6] New South Wales: *Jordan* v. *Metropolitan Water, Sewerage and Drainage Board* (1943) 29 Aust.Dig. 451. New Zealand: *Sillick* v. *Taupiri Coalmines, Ltd.* [1922] N.Z.L.R. 513. Maine: 78 A.L.R. 1250. Massachusetts: 107 A.L.R. 821. Michigan: *Gage* v. *Board of Control of Pontiac State Hospital* (1919) 7 A.L.R. 533. Nebraska: 145 A.L.R. 1284. Oklahoma: 145 A.L.R. 1285. Rhode Island: 78 A.L.R. 1250. Texas: 78 A.L.R. 1252; Kermickel, *op. cit.*, first note 6, *ante*. Republic of Ireland: *Dennehy* v. *O'Shea's, Ltd.* (1954) 90 I.L.T.R. 1 (Supreme Court).

[7] *Connolly* v. *Young's Paraffin Light and Mineral Oil Co., Ltd.* (1894) 22 R. 80.

[8] *M'Fadyen* v. *Dalmellington Iron Co.* (1897) 34 S.L.R. 266.

[9] And see 38/50 (S.B.) (Northern Ireland). See also, for similar views on workmen's compensation: New South Wales: *Hall* v. *Skuthorpe* (1926) 22 Aust.Dig. 1267; *Burns* v. *Commissioner for Railways* (1939) 29 Aust.Dig. 457. Ontario: *Armstrong* v. *Canada Atlantic Ry.* (1902) 4 O.L.R. 560. U.S.A. generally: Appel, "Construction of Statutory Excuse for Failure to give Written Notice of Injury" (1927) 12 Cornell L.Q. 230. South Dakota: 92 A.L.R. 511. Tennessee: 78 A.L.R. 1250. Virginia: 78 A.L.R. 1252 (all "reasonable excuse").

for not delivering them in time.[10] In R(S) 25/52, the claimant addressed his certificate to the local national insurance office and put it in the out-tray at his office. The clerk responsible for posting it failed to do so. The claimant made no inquiries for ten days. It was held that he had good cause for delay: he had acted as a reasonable man would have done.[11]

Allied to these cases are those where the insured person delegates the job of making the claim and the agent makes a mess of it. In R(S) 4/52, a girl aged fifteen who had never had to claim before and who was in hospital for a serious illness left the sickness benefit question to the judgment of her parents. They relied on the opinion of a "Society Collector" that the girl was too young for benefit. When the mistake was discovered, it was held that she had good cause for the delay (though on the authorities the *parents* did not have good cause). The New Zealand Compensation Court has held[12] that a minor had reasonable cause for delay where his guardian *ad litem* bungled the claim.

In C.G. 207/49, a claim for maternity grant and attendance allowance, the claimant was ill after confinement. She left the business of claiming to her husband, the husband thought the hospital was attending to it, and in fact no claim was made at all. The claimant was held to have good cause for part but not all of the period of over two months delay after she left hospital. The commissioner said: "When a claimant was seriously ill, and unable to attend to a claim at the time when she should have attended to it in order to comply with the relevant regulations, the question to be considered in determining whether or not she had good cause for her failure to make a claim before the date on which it was made depends upon the answer to the question 'Has she done all that she could reasonably be expected to do in the interval?' She is not entitled to leave to others the making of her claim, and take no further interest in the matter. It is her duty to follow up the matter for herself, so far as she can reasonably be expected to do so, having regard to her condition and circumstances."[13]

It was stated for unemployment benefit, in C.U. 78/49, that where a claimant's association has an arrangement with the ministry for collective claims by an association official on behalf of all the entitled members of the association, and the arrangement is not complied with during the prescribed time, all the individual beneficiaries (except the defaulting official) have good cause for delay in putting forward their individual claims.[14]

[10] And see C.G. 153/49; 2/52 (S.B.) (Northern Ireland); *Kitchen* v. *C. Koch & Co.* (1931) 24 B. 294 (H.L.).

[11] A similar case is C.S. 596/49.

[12] *Sutton* v. *Esive Singh* [1940] N.Z.L.R. 695.

[13] And see 18031/30 (unemployment insurance); 78 A.L.R. 1258 (Kentucky); 92 A.L.R. 511 (Texas).

[14] And see, as to New South Wales: *Small* v. *Metters, Ltd.* (1941) 41 N.S.W. S.R. 97; as to New Zealand: *Mahoney* v. *Thomas Borthwick & Sons*

Several cases have arisen of solicitors bungling claims for death grant. In C.G. 1/50, clerks at the registry of deaths expressed conflicting opinions as to the claimants' right to this benefit, so she put the matter in the hands of the solicitor who was already dealing with probate for her. He made a late claim, not having good cause himself for the delay. The claimant succeeded,[15] and the commissioner said: "In a case in which it was practicable for the beneficiary to make his claim for benefit himself but he has delegated the task of making it to another person who fails to make the claim in time, good cause for the failure can be shown by proving that having regard to all the circumstances, including the beneficiary's education and experience of affairs, a reasonable person in the same position would not have thought it necessary to send the claim to the local insurance office himself but would have relied on the other person to send it in time and would have taken no steps beyond those (if any) which the beneficiary took to ensure that the other person had sent the claim in time." Then he added a cautionary note: "I desire to emphasise that a claimant can only prove good cause if he shows that he did all that he reasonably could to ensure that the claim was made in time. Every case of this kind must be judged in the light of the particular circumstances: it does not follow from this decision that in a case in which the claimant is in no doubt about his legal right to the benefit and is not already consulting a solicitor about a matter closely connected with the claim but merely asks the solicitor (as he might ask a lay friend or employee) to make the claim for him in order to save himself time and trouble, the claimant will be held to have proved good cause for delay if the solicitor fails to make the claim in time."

The full tribunal of commissioners, in R(G) 9/52, adopted the principle as to delegation stated in C.G. 207/49.[16] On an executor's late claim for death grant, the majority held that the claimant had not got good cause for delay in being under the impression that the deceased's son was claiming or in thinking that the solicitor who was acting as law agent in the executry would attend to the matter. The solicitor had not been specifically instructed to claim death grant.[17] The dissentient made four points: (1) It was not established as a fact that no specific instructions were given to the solicitor. (2) An executor cannot be expected to know about death grant in the same way as an insured person is expected to know about his own benefits. (3) Generally a person cannot shelter behind his own ignorance. "In other words a claimant should seek advice at an office of the Ministry. But

(*Australasia*), *Ltd.* [1944] N.Z.L.R. 80; *cf. Welsh* v. *Ocean Beach Freezing Co., Ltd.* [1944] N.Z.L.R. 92.

[15] *Cf.* C.G. 76/50.

[16] See last note 13, *ante*. See also, as to delegation of claiming to a law firm in Texas, Kermickel, *op. cit.*, first note 6, *ante*.

[17] And see 871/49 (S.B.) (Northern Ireland).

surely *only if* he was not in touch with a person who was, or should have been, even better qualified to give the necessary guidance than a clerk—possibly a not very experienced clerk—consulted at an office of the Ministry?" (4) Referring to caution about employing solicitors expressed in C.G. 1/50,[18] while that might apply to other benefits it ought to be part of every probating solicitor's duty, without any specific instructions, to apply for death grant.

In R(G) 17/52, an executor gave a general instruction to a solicitor to get in the deceased's estate, but did not specifically mention death grant. He did, however, send, among other papers, the deceased's national insurance card and death certificate and leaflet N.I. 49 (which explains about death grant). The solicitor did not claim in time, but it was held that the executor had good cause for delay. C.G. 1/50 [18] was followed and R(G) 9/52 [19] distinguished.

Offending the doctor

On a late claim for disablement benefit—R(I) 16/53—the claimant said the delay was due to the time it took to convince his doctor that he was disabled. He thought that if he claimed before that he would be prejudicing future relations with the family doctor. This made him two and a quarter years late. The commissioner said: "I think a man may reasonably be deterred from making a claim for disablement benefit by the feeling that if he does so he will give offence to his own doctor. But there is a limit to this. It might be reasonable to abstain from making a claim for a short time if he felt that his doctor was probably right in treating the disability as temporary and trivial, yet it would not be reasonable to abstain from claiming for a long time, or if he felt all along that the doctor was probably wrong." Both these features were against the claimant, and accordingly the cause for delay was held not reasonable.

Ignorance of the law

Ignorance of the statutory provisions, of the regulations, or of decisions under them, so that one does not know a claim could be made, or so that one does not know the correct procedure for claiming, does not constitute relieving cause for delay. It has been held not reasonable cause for delay in claiming under the industrial injuries scheme in Great Britain [20] and in Northern Ireland,[1] and that was also the position under our Workmen's Compensation Acts.[2] It has been held not good cause for delay

[18] See last note 15, *ante*.
[19] See last note 16, *ante*.
[20] C.I. 14/49; R(I) 16/53; R(I) 51/53; R(I) 28/54; R(I) 79/54. *Cf.* R(I) 51/54.
[1] 1/50 (I.I.); 1/52 (I.I.).
[2] *Roles* v. *Pascall & Sons* [1911] 1 K.B. 982; *Judd* v. *Metropolitan Asylums Board* (1912) 5 B. 420; *Melville* v. *M'Carthy* (1912) 47 I.L.T.R. 57

in claiming sickness benefit in Great Britain [3] and Northern Ireland,[4] unemployment benefit in Great Britain [5] and Northern Ireland,[6] and maternity benefit,[7] widow's benefit,[8] and death grant [9] in Great Britain cases. It was the rule, too, of the old unemployment insurance scheme.[10]

In R(I) 16/53, the claimant strained his wrist on January 24, 1950, while lifting timber. He received benefit until February 4, 1950, and thereafter was back at work more or less continuously until May, 1952, when he entered hospital for an operation on his wrist. He left hospital on June 2, 1952, and claimed disablement benefit on June 18 of that year (two and a quarter years late). When first asked to explain the delay, the claimant said he was unaware of the time limit. The commissioner commented: "It is well established that ignorance of one's right to benefit or of the procedure for obtaining benefit cannot by itself amount to reasonable cause for delay in claiming it." The claimant also said (a) that as he had notified the injury he thought no further notification was necessary until he was able to substantiate the claim for disablement benefit, and (b) he thought he had first to establish his claim on medical grounds with his own doctor, who for a long time thought the injury slight and temporary. Neither of these erroneous beliefs was held to amount to reasonable cause for delay.

The claimant in C.S. 371/49,[11] was held not to have good cause for delay in claiming in that she did not know sickness benefit was payable to a person in receipt of full wages. A delayed injury benefit claim was made in C.I. 14/49,[12] where the claimant's

(C.A., Ireland); *Leslie* v. *Robson* (1920) 13 B. 150. And see *Bramley* v. *Evans & Sons* (1909) 3 B. 34; *Clay* v. *Sherwood Colliery Co., Ltd.* (1922) 15 B. 203; *Aldridge* v. *Warwickshire Coal Co., Ltd.* (1925) 18 B. 131. *Cf. Rankine* v. *Alloa Coal Co., Ltd.* (1904) 6 F. 375 (Court of Session).

3 C.W.S. 3/48; C.S. 35/48; C.S. 34/49; C.S. 99/49; C.S. 156/49; C.S. 371/49; C.S. 554/49; C.S. 42/50; C.W.S. 14/50; C.S. 270/50; C.S. 414/50; C.S. 453/50; C.S. 537/50. *Cf.* C.S. 613/49.

4 488/48 (S.B.); 951/48 (S.B.); 483/48 (S.B.); 287/49 (S.B.); 536/49 (S.B.); 407/49 (S.B.); 1119/49 (S.B.); 38/50 (S.B.); 83/50 (S.B.); 9/53 (S.B.).

5 R(U) 5/52.

6 See 84/50 (U.B.).

7 Attendance allowance: C.G. 15/48; C.S.G. 6/48; C.S.G. 9/49; R(G) 3/53; C.G. 47/49; maternity allowance: C.W.G. 2/49; maternity grant: R(G) 3/53.

8 C.G. 153/49 (widow's pension).

9 C.G. 125/50, where it was held that neither ignorance of the law nor having a great deal of harassing business to transact in connection with the death, nor both together, constituted a good cause for delay; C.G. 184/50, where it was also held that leaving claiming to a person resident in the deceased's area, when the claim could be made by post, did not make the agent's ignorance good cause; R(G) 9/52 (tribunal of commissioners).

10 1213/1929; 1999/33; 354/37 (Northern Ireland), and many subsequent Northern Ireland decisions. And see 3104/38. See also, regarding the old sickness benefit system, *National Health Insurance Approved Societies Handbook* (1933), p. 101, para. 383.

11 And see C.S. 554/49; C.S. 537/49.

12 And see C.S. 99/49.

reason for the delay was that she did not know where to send the medical certificates and that she was not fully aware of the changes that had been made with regard to the method of claiming for industrial injury. The claim failed, and the commissioner said: "Mere ignorance of the Regulations . . . is not reasonable cause for failure to make a claim within the prescribed time. A person who does not know can normally inquire at a local insurance office." This need to inquire of a competent person is stressed in many cases. In C.S. 42/50, it was pointed out that there is no need to make inquiries until the occasion of a claim arises.

In C.S.G. 6/48, the commissioner suggested that if the explanation of the ignorance were the condition of health of a particular claimant or a want of intelligence good cause for delay might be proved. In 1/52 (I.I.), the grounds put forward for the delay were the claimant's ignorance and tender age of fifteen, and the absence of her mother from home due to the mother's father's death (but the claimant's father was at home). These were held not to be reasonable cause. The claimant's minority was not a reasonable cause in itself. (In Texas, minority is a factor to be taken into account in determining whether there is good cause for delay, but whether it can ever amount to good cause on its own is doubtful.[13] The Supreme Court of Victoria has held [14] that being six years old is reasonable cause for delay.) As to the rest, the Northern Ireland umpire said: "Neither do I think that claimant's age raises a presumption in her favour that reasonable cause for delay in claiming can be said to exist. Each case must be examined on its merits, and the mental capabilities of the individual claimant assessed." Here there was no evidence of lack of mental capacity, only ignorance. A contrast is R(I) 51/54. The claimant injured his knee in February, 1951. He was found in November of that year to be suffering from a tubercular hip joint. He claimed disablement benefit in April, 1953. Subsequently a medical board found that the disease was due to the accident. Before claiming, the applicant knew nothing about the industrial injuries scheme; he did not realise the connection between the accident and the disease; his brain only began to function normally when he could first get about on crutches in January, 1953: he then realised there might be a connection. This claimant succeeded despite the delay.[14a]

Opinions as to ignorance of the law are divided in the United States of America. It has been held in certain states not to excuse delay.[15] In Texas, it is not clear whether ignorance is good cause or not.[16] In Minnesota, ignorance of the law takes

[13] See 142 A.L.R. 1042.
[14] *Green* v. *Hansen* (1923) 29 Argus L.R. 452.
[14a] And see R(I) 43/55.
[15] Idaho: 92 A.L.R. 510; Tennessee: 78 A.L.R. 1252.
[16] See 78 A.L.R. 1253; Kermickel, *op. cit.*, first note 6, *ante*.

a claimant out of the time limit by express statutory provision.[17] In Canada [18] the English view is followed, but in Australia there has been a departure from that approach. In New Zealand, after considering the Australian doctrine, the Court of Appeal [19] followed the English authorities.

The development of the Australian case law has been pendulous. In *Murray* v. *Baxter*,[20] a New South Wales case, the High Court held that the ignorance there proved amounted to reasonable cause for the delay. Eight years later, the Supreme Court of New South Wales [1] seemed to take the opposite view. Then after another fifteen years, in *Stevenson* v. *Metropolitan Meat Industry Commission*,[2] the same court followed *Murray* v. *Baxter*. Davidson J. grappled with the distinctions between the cases. He said [3]: "... it is not an excuse to rely upon absolute ignorance of the law, but this cannot mean that an applicant is bound to know the law in its correct application to every set of facts ..." And later [4]: "... when an applicant knows the law to the degree that it provides that, in the case of injury in his employment, he is entitled in some circumstances to compensation, and bona fide applies his mind with the information in his possession and knowledge to the question of the application of the law as he knows it to the facts of his own particular case, and misconceives his true position in law or fact or in both combined, he is not ignorant, but mistaken, although his mental process may not reach the standard which would be ascribed to a reasonable man." This fine treading between the lines of complete ignorance and merely extensive ignorance is continued by the later New South Wales cases.[5]

A person who is ignorant or in doubt is supposed to inquire of the ministry, or, in certain circumstances, of a solicitor. If he does so, he has good cause for delay where completing the inquiries runs him over the prescribed time.[6] An extended application of this principle is C.U. 78/49, where there was a late claim for

17 See 78 A.L.R. 1254.
18 See 78 A.L.R. 1254 (Alberta and Manitoba).
19 *Wilson* v. *Gannaway & Co., Ltd.* [1932] N.Z.L.R. 843. *Cf. Williams* v. *Henderson & Pollard, Ltd.* [1946] N.Z.L.R. 238 (Compensation Court).
20 (1914) 18 C.L.R. 622. *Cf. Nelson* v. *Bankie* (1924) 22 Aust.Dig. 1264 (South Australia).
1 *Re An Arbitration between Dyball and Railway Commissioners for N.S.W.* (1922) 22 Aust.Dig. 1273. *Cf. Benison* v. *Booty* (1924) 27 W.A.L.R. 3 (Western Australia).
2 (1937) 37 N.S.W.S.R. 109.
3 37 N.S.W.S.R. 117.
4 37 N.S.W.S.R. 118.
5 *Flint* v. *Lithgow Valley Colliery Co., Ltd.* (1937) 29 Aust.Dig. 452; *McLeish* v. *Public Works Department* (1937) 29 Aust.Dig. 457; *Jordan* v. *Metropolitan Water, Sewerage and Drainage Board* (1943) 29 Aust.Dig. 451; *Garratt* v. *Tooheys, Ltd.* [1950] Aust.Dig. 561; *Rutherford* v. *A. C. Saxton & Sons Pty, Ltd.* [1950] Aust.Dig. 562.
6 C.S. 42/50 (sickness benefit); R(G) 3/53 (maternity grant and attendance allowance).

unemployment benefit. The unemployment was caused by a lock-out, and the claimant's delay was due to awaiting a reply from his union as to whether they were going to pay lockout pay. (It is probable that had they done so unemployment benefit would not have been payable.) As soon as the claimant heard no lockout pay was forthcoming he made a claim, which was successful.[7]

There comes a stage, apparently, at which even a normal person may be ignorant of the law affecting his own right to benefit. R(S) 18/52 was a late claim for sickness benefit. A schoolmaster was in contact with scarlatina, and was consequently away from work for twelve days on full pay. He did not realise he could claim until later told by his employers to do so. The commissioner held there was good cause for the delay. A reasonable man might well have failed to realise there was a regulation deeming him incapable of work while quite healthy. It might be different if his employers did not pay him, as he would then probably apply for unemployment benefit and thus find out about sickness benefit.

Ignorance regarding an injury

A special class of ignorance often crops up in industrial injury cases: that is where the claimant has been for a time unaware that his injury is so serious that it is going to result in disablement. Where it is reasonable to be unaware of this, there has been held [8] to be reasonable cause for delay in claiming. In C.I. 273/50, a man had injured his thumb. When the bandage was removed, the thumb was stiff. He thought the stiffness was due to the bandage, and the doctor did not suggest anything serious was wrong. Later, it was found that there was an injury to the joint, and a claim was made for disablement benefit. The commissioner held there was reasonable cause for delay down to the date of discovery of the disability. In R(I) 16/51, there was also a late claim for disablement benefit. The claimant was not incapable of work at first because his employer found him work suitable to his condition and allowed him leave of absence for medical treatment. Months later he was examined by a surgeon at a hospital, and it was found that he had a serious disability. The commissioner held there was reasonable cause for delay down to the day after the surgeon's examination but not thereafter. By virtue of his being able to perform his allotted duties and the gradual improvement of his injury under treatment, the claimant did not think his injury sufficiently serious to cause him to make inquiry as to his rights under the Act: that was reasonable.

Under the Workmen's Compensation Acts, the principle was worked out that there was reasonable cause for delay during a period when the disability was latent or when it reasonably appeared

[7] See also 1774/35 (unemployment insurance).
[8] C.I. 273/50; R(I) 16/51. And see 1/52 (I.I.) (Northern Ireland).

to be trivial.[9] For example, in *Breakwell* v. *Clee Hill Granite Co., Ltd.*,[10] when a cripple had an accident he gave no notice of it to his employers, thinking he would soon be well, in which case he had no intention of claiming as he feared the insurance company might stop him going back to work. He later discovered he was incapacitated from ever working again, whereupon he claimed. The Court of Appeal held he had reasonable cause for delay.

In *Rankine* v. *Alloa Coal Co., Ltd.*,[11] the claimant did not think his injury was as serious as his doctor had told him, and did not think the relevant occurrence was an accident within the meaning of the Workmen's Compensation Act, 1897. Both these beliefs were wrong. The workman did not intend to claim if he recovered as quickly as he expected. He did not recover, and he consulted a law agent, who advised him he had no claim. He thereupon claimed and succeeded, the Court of Session holding there was reasonable cause for the delay. According to Lord M'Laren [12] the doctor had been euphemistic. According to Lord Kinnear [13] a

[9] *Hoare* v. *Arding & Hobbs* (1911) 5 B. 36; *Breakwell* v. *Clee Hill Granite Co., Ltd.* (1911) 5 B. 133; *Fry* v. *Cheltenham Corp.* (1911) 5 B. 162; *Refuge Assurance Co., Ltd.* v. *Millar* (1911) 5 B. 522 (Court of Session); *Ellis* v. *Fairfield Shipbuilding & Engineering Co., Ltd.*, 1913 S.C. 217 (Court of Session); *Thompson* v. *North Eastern Marine Engineering Co., Ltd.* (1914) 7 B. 49; *Zillwood* v. *Winch* (1914) 7 B. 60; *Haward* v. *Rowsell & Matthews* (1914) 7 B. 552; *Coulson* v. *South Moor Colliery Co.* (1915) 8 B. 253; *Smith & Leishman* v. *Flood* (1915) 8 B. 613 (Court of Session); *White* v. *Ford Motor Co., Ltd.* (1917) 10 B. 334; *Walters* v. *Wall & Sons, Ltd.* (1917) 10 B. 667; *Dobson* v. *Anglo-Saxon Petroleum Co., Ltd.* (1921) 14 B. 95; *Foley* v. *J. Hardie & Co.* [1923] 2 Ir.R. 85 (C.A., Irish Free State); *Fenton* v. *Owners of Ship Kelvin* [1925] 2 K.B. 473; *Albison* v. *Newroyd Mill, Ltd.* (1925) 18 B. 474; *Templeton* v. *E. & J. Coupe & Sons, Ltd.* (1932) 25 B. 56; *Flinders* v. *A. A. Jones & Shipman, Ltd.* (1932) 25 B. 563; *Phillips* v. *G. I. Sidebottom & Co., Ltd.* (1934) 27 B. 382; *Ince* v. *Pulling & Wolsey, Ltd.* (1935) 28 B. 154; *Ellison* v. *Calvert & Heald* [1936] 3 All E.R. 467 (H.L.); *Fitchett* v. *C. D. Holmes & Co., Ltd.* (1937) 30 B. 289; *Stenning* v. *Southern Ry. Co.* (1937) 30 B. 430; *Sims* v. *Jas. Roscoe & Sons* (1938) 31 B. 184; *Burke* v. *McDonough's Fertilizers, Ltd.* (1939) 74 I.L.T.R. 93 (Supreme Court, Irish Free State); *Schofield* v. *Halstead, Ltd.* (1941) 34 B. 99; *McLoughlin* v. *Galway C.C.* [1953] Ir.R. 143 (Supreme Court, Republic of Ireland). And see *Stinton* v. *Brandon Gas Co., Ltd.* (1912) 5 B. 426; *Eydmann* v. *Premier Accumulator Co.* (1915) 8 B. 121; *Wassell* v. *Russell & Sons* (1915) 8 B. 230; *Howarth* v. *Clifton and Kersley Coal Co., Ltd.* (1920) 13 B. 179; *Lingley* v. *Thomas Firth & Sons, Ltd.* [1921] 1 K.B. 655; *Redman* v. *Sunderland Corp.* (1934) 27 B. 376; *Dunne* v. *Offaly C.C.* [1939] Ir.R. 358 (Supreme Court, Irish Free State). *Cf. Webster* v. *Cohen Bros.* (1913) 6 B. 92; *Clapp* v. *Carter* (1914) 7 B. 28; *Potter* v. *John Welch & Sons, Ltd.* [1914] 3 K.B. 1020; *White* v. *Leicestershire Colliery and Pipe Co., Ltd.* (1932) 25 B. 189 (H.L.); *Bedford* v. *Bell & Whinney, Ltd.* (1933) 26 B. 161; *Elliott* v. *Great Northern Ry.* (*Ireland*) (1934) 69 I.L.T.R. 3 (C.A., Irish Free State); *Holborough* v. *United Dairies* (*London*), *Ltd.* (1937) 30 B. 372; *Hodge* v. *Wakefield Trinity Football Club* (1937) 30 B. 359; *McNulty* v. *County Donegal Joint Railways Committee* [1943] Ir.R. 549 (Supreme Court, Irish Free State). See also *McDonnell* v. *Coras Iompair Eireann* (1954) 89 I.L.T.R. 181 (Supreme Court, Republic of Ireland).

[10] (1911) 5 B. 133.

[11] (1904) 6 F. 375. And see *Brown* v. *Lochgelly Iron & Coal Co., Ltd.*, 1907 S.C. 198 (Court of Session).

[12] 6 F. 383.

[13] 6 F. 384.

person not instructed in physiology might not have understood what the doctor said.[14]

The line may be thin between this class of case and that where the claimant delays because he does not know the nature of a disease he has contracted. In R(I) 82/53,[15] the claimant got a skin rash. He did not know what it was, but he knew it was due to his work. After treatment at a medical centre for some nine months, he saw a dermatologist, who diagnosed the trouble as one of the prescribed diseases. The claimant then claimed. The local appeal tribunal held it was reasonable not to claim until he knew he had a prescribed disease. The commissioner reversed this decision, holding that the claimant's delay was due simply to ignorance of his rights or of the procedure for claiming. He could have left the question whether he had a prescribed disease to be decided by the national insurance (industrial injuries) machinery.

It is different, and back over the line again, if the claimant was unaware that he had a disease at all. In R(I) 6/54, the claimant had been twenty-five years a coalminer, including fourteen years at the coalface. At the age of forty-two he was short of breath and not working to his own satisfaction. Accordingly, he left the pit and obtained lighter work elsewhere. He thought he was healthy but growing old. Two years later, a mass radiography unit visited his workplace and he discovered he had pneumoconiosis, and must have had it since his coalmining days. He then claimed disablement benefit, as pneumoconiosis is a prescribed disease for coal miners. It was held that the claimant had reasonable cause for the delay, and was entitled to benefit as from the date he left the pit.

[14] The "latent or trivial" principle has also been applied in New South Wales: *Abdulla* v. *Bastany* (1931) 22 Aust.Dig. 1269; *Flint* v. *Lithgow Valley Colliery Co., Ltd.* (1937) 29 Aust.Dig. 452; South Australia: *Carswell* v. *Jannsen* (1912) 22 Aust.Dig. 1266; Victoria: *King* v. *Australian Paper Manufacturers, Ltd.* (1943) 29 Aust.Dig. 459; Western Australia: *Smith* v. *Kalgoorlie & Boulder Firewood Co., Ltd.* (1917) 19 W.A.L.R. 69; New Zealand: *Sillick* v. *Taupiri Coalmines, Ltd.* [1922] N.Z.L.R. 513; *Cross* v. *Cole* [1932] N.Z.L.R. 1588; *Heath* v. *Waihi Gold-mining Co., Ltd.* [1935] N.Z.L.R. 103; *Peacock* v. *Martha Gold-mining Co., Ltd.* [1936] N.Z.L.R. 25; *Girvin* v. *Bay of Islands County* [1938] N.Z.L.R. 258; *Penberthy* v. *Martha Gold-mining Co.* (*Waihi*), *Ltd.* [1944] N.Z.L.R. 377; *Shatford* v. *Andersons, Ltd.* [1949] N.Z.L.R. 20; U.S.A.: see Riesenfeld & Maxwell, *Modern Social Legislation*, p. 333; (note) 6 Loyola L.R. 79; District of Columbia ("satisfactory reason"): 145 A.L.R. 1285, 1286; Idaho: 145 A.L.R. 1285; Indiana: 78 A.L.R. 1255, 1256; Kentucky: 92 A.L.R. 510, 145 A.L.R. 1285; *American Rolling Mill Co.* v. *Stevens* (1942) 145 A.L.R. 1256; Louisiana: Tate, "Workmen's Compensation Claimants' Latent or Unknown Injuries—Prescription" (1951) 12 Louisiana L.R. 73; Massachusetts: 107 A.L.R. 821; 145 A.L.R. 1287; Wisconsin: Larson, "Model Workmen's Compensation Act" (1955) 23 Tennessee L.R. 838, 841; Maine: 78 A.L.R. 1249, 1255; Tennessee: 78 A.L.R. 1251; 145 A.L.R. 1288; (note) (1954) 8 Vanderbilt L.R. 161; Virginia: 78 A.L.R. 1252; New York ("sufficient reason"): 107 A.L.R. 821; 145 A.L.R. 1285, 1286, 1287; Oklahoma: 78 A.L.R. 1254; 145 A.L.R. 1285; Missouri ("good cause"): 92 A.L.R. 510; 145 A.L.R. 1287; Texas: 145 A.L.R. 1285, 1286.

[15] And see *Egerton* v. *Moore* (1912) 5 B. 284; *Clapp* v. *Carter* (1914) 7 B. 28; *Potter* v. *John Welch & Sons, Ltd.* [1914] 3 K.B. 1020; *Fox* v. *Barrow Haematite Steel Co., Ltd.* (1915) 8 B. 431.

Similarly, the claimant would succeed if the delay was caused by reasonably not realising that the disablement was due to his work.[16] Furthermore, it has been held under the Workmen's Compensation Acts that a mistake as to the date of the accident may be reasonable cause for delay.[17]

Inability to prove the case

Inability to prove the case, due to some formal impediment or uncertainty of fact, constitutes good or reasonable cause for delay,[18] as has also been held under workmen's compensation.[19] In R(S) 29/52, the claimant's doctor issued a final certificate; the claimant thereupon changed his doctor and got a certificate of incapacity from his new doctor. This took some time, and was held to be good cause for delay. In R(S) 36/52, the claimant asked his doctor for a certificate of incapacity; she said that was not necessary, and did not give one until some time later. The claimant was held to have good cause for delay. In R(I) 69/52, on a claim for disablement benefit the medical board said the claimant's loss of faculty was not likely to be permanent. The claimant then withdrew his claim before it was adjudicated on. Five months later (*i.e.*, four months late), he claimed again, as it was now clearly probable that the disability was permanent. A re-examination by the medical board showed a likelihood of permanency. This claim was allowed, and the commissioner held that inability to prove a case was reasonable cause for delay.

Misunderstanding official information

It is said that the ignorant must inquire. It they do, the question will immediately be encountered: is their misunderstanding

[16] R(I) 51/54. See p. 353, *ante*. See also *Baldwin* v. *L.N.E.R.* (1936) 29 B. 227; *Smethurst* v. *Beaumonts (Manchester), Ltd.* (1940) 33 B. 271. New South Wales: *Cram* v. *Fresh Food and Ice Co., Ltd.* (1928) 22 Aust.Dig. 1265; *Dixon* v. *Caledonian Collieries, Ltd.* (1931) 22 Aust.Dig. 1270; *Watts* v. *Cameron & Sons, Ltd.* (1937) 29 Aust.Dig. 452; *Richardson* v. *Austral Stevedoring and Lighterage Co., Ltd.* (1939) 29 Aust.Dig. 459. Western Australia: *Bridson* v. *Perth Diocesan Trustees* (1925) 27 W.A.L.R. 96. U.S.A.: Riesenfeld & Maxwell, *loc. cit.*, last note 14, *ante*; D.C.: 92 A.L.R. 509; New York: 107 A.L.R. 822; Oklahoma: 78 A.L.R. 1253; Rhode Island: 78 A.L.R. 1257; Texas: 78 A.L.R. 1253; 145 A.L.R. 1288; Virginia: 78 A.L.R. 1252.

[17] *Nolan* v. *Duigan* (1945) 80 I.L.T.R. 49 (Supreme Court, Irish Free State).

[18] Unemployment benefit: C.U. 78/49; sickness benefit: R(S) 29/52; R(S) 36/52; disablement benefit: R(I) 69/52. And see C.G. 153/49 (widow's pension); 24596/31 (unemployment insurance).

[19] *Tibbs* v. *Watts, Blake, Bearne & Co., Ltd.* (1909) 2 B. 164; *Eke* v. *Hart-Dyke* [1910] 2 K.B. 677; *Kitchen* v. *C. Koch & Co.* (1931) 25 B. 294 (H.L., where, at p. 306, Lord Atkin commented: "Reasonable cause for failure to make a claim for an accident seems to me a different thing from reasonable cause for failure to make an accident"); *Gwilym* v. *Aberbeeg Collieries, Ltd.* (1936) 29 B. 273; *Easterling* v. *Peek, Frean & Co., Ltd.* [1938] 2 K.B. 300. New South Wales: *McComas* v. *Goldsbrough Mort & Co., Ltd.* [1949] Aust. Dig. 530. And see *Williams* v. *New British Rhondda Colliery Co., Ltd.* (1932) 25 B. 75; *Flinders* v. *A. A. Jones & Shipman, Ltd.* (1932) 25 B. 563; *Dunne* v. *Offaly C.C.* [1939] Ir.R. 358 (Supreme Court, Irish Free State). *Cf. Holt* v. *Andrew Hobson & Sons* (1930) 23 B. 242.

of the answer good or reasonable cause for delay? In C.S. 613/49, it was said that a mistake as to the meaning of official information which a reasonable man might well make was good cause. In R(S) 14/54, the claimant for sickness benefit, who was self-employed, had previously been told by ministry officials that a self-employed person was not entitled to benefit. That was with reference to a claim for unemployment benefit, but the claimant thought it applied to any benefit. Accordingly, he did not apply for sickness benefit until corrected by a hospital almoner. He was held to have good cause for the delay. Nothing was said about reasonableness in this case.

Acting on wrong advice

In 38/50 (U.B.), the Northern Ireland umpire said that while ignorance alone would not avoid forfeiture for delay, if "any action, advice, or notification, or lack of such by the Ministry or the Insurance Officers dealing with the claimant's case, placed him in a position which caused or could have contributed substantially to the claimant's misapprehension and consequential failure to take action in accordance with the regulations," then there would be good cause for delay.[20] In R(U) 6/52, a claim for unemployment benefit was turned down by the insurance officer on the ground that, being a seasonal worker, the claimant was not entitled in the circumstances. His decision was affirmed unanimously by the local tribunal. The claimant did not claim again until after the commissioner had decided in another case that people of the claimant's class were not seasonal workers. She then claimed again for certain past periods, and the commissioner held she had good cause for the delay, having acted reasonably.[1]

Where the wrong advice is given by a solicitor the same principle appears to operate. In C.S.I. 10/50, the claimant either was advised by his solicitor that a claim for injury or disablement benefit would prejudice a common law claim against his employer or reasonably thought that he had been so advised. There was held to be reasonable cause for claiming late. Again, holding wrong advice by a solicitor to be good cause for delay in claiming sickness benefit, the commissioner said (C.S. 50/50): "The claimant's rights under the National Insurance Scheme do not depend upon official policy or upon matters which are peculiarly within the knowledge of the Ministry, but upon the legal interpretation of the National Insurance Acts and the regulations made thereunder, all of which are available to the public. A solicitor is legally qualified to interpret Acts of Parliament and regulations, and is admitted to the roll of solicitors for the purpose, *inter alia*, of giving advice thereon to members of the public. It is perfectly reasonable for a

[20] And see 145 A.L.R. 1289 (Nevada).

[1] And see the following unemployment insurance cases: 10803/30; 19970/32; 4283/33; 5753/35; 142/44 (Northern Ireland).

claimant to consult a solicitor on such a matter and to accept his advice. In saying this I must not be understood to detract in any way from the advice given by the Minister to insured persons, that if in doubt they should ask their nearest National Insurance Office for help and explanation." [2]

It is probably otherwise by now with doctors. In C.S. 286/49, on a claim for sickness benefit, it was held good cause for delay that the claimant had acted on wrong advice by a doctor,[3] but the commissioner, while recognising its existence, said that the confusion between the national insurance scheme and the health service would become progressively less justifiable.

Being misled by his own employer generally does not constitute good cause for a claimant's delay.[4] In R(I) 28/54, the claimant had an industrial accident. A wages clerk told her that the wages department would look after her benefit claim. Eleven days later she received payments which she thought were injury benefit. When she subsequently discovered her error she made a claim. The commissioner held there was no reasonable cause for delay during the first eleven days, but that there was reasonable cause from the end of that period until she discovered the true position. The eleven days were covered by the ordinary ignorance principle: the claimant should have asked the ministry or read their pamphlets. Thereafter, though, a reasonable person might think he had correctly ascertained the position and so not inquire.[5] In C.S. 80/49, the claimant was employed by the War Department. He was told by a superior that a man off sick should send his certificates to the superior's office and his pay would be made up. He understood that his employer was working in conjunction with the national insurance offices. He accordingly sent his medical certificates to his superior, but later discovered he should claim. The commissioner held that there was good cause for the delay: the claimant's belief was reasonable, at least where his employer was a government department.[6]

You certainly cannot rely on every Tom, Dick and Harry. In C.S.G. 9/49, on a claim for attendance allowance, the commissioner held that wrong advice by a neighbour was not good cause for delay in claiming. In 4681/38, a case under the old unemployment insurance scheme it was held that being misled by a trade union official was not good cause.

[2] And see *Burns* v. *Commissioner for Railways* (1939) 29 Aust.Dig. 457 (New South Wales).

[3] *Cf.* 1259/49 (S.B.) (Northern Ireland); *Williams* v. *Henderson & Pollard, Ltd.* [1946] N.Z.L.R. 238.

[4] *Cf. McComas* v. *Goldsbrough Mort & Co., Ltd.* [1949] Aust.Dig. 530 (New South Wales); *Simpson* v. *Geary* [1921] N.Z.L.R. 285; *Wilson* v. *Gannaway & Co., Ltd.* [1932] N.Z.L.R. 843; 145 A.L.R. 1284 (Texas).

[5] And see C.S. 596/49; 2/52 (S.B.) (Northern Ireland); *Prophet* v. *Roberts* (1918) 11 B. 301; cases cited under heading "Defective Mode of Claiming," *ante*.

[6] To the same effect is 2/52 (S.B.) (Northern Ireland).

THE CRITERION

The large number of decisions given since the new schemes came into operation in mid-1948 should give a pretty clear idea of how the commissioner and the umpire arrive at their results. Unfortunately, it remains impossible to be certain how they do decide what constitutes good or reasonable cause for delay. True, the reports often disclose a closely reasoned argument as to whether there is good or reasonable cause in the particular case, generalising about classes of cases, or even purporting to apply to all types of cases. But throughout there is an assumption that there is an ascertained criterion of goodness or reasonableness. Sometimes it is stated in general terms what these abstractions mean, but there is nowhere any indication how the definition was arrived at.

For a start, the commissioners and umpire say that "good" and "reasonable" when here applied to cause, are synonymous adjectives. They may be, but there are arguments for the contrary view: it is hard to get over the use by Parliament of different expressions in two National Insurance Acts passed about the same time. Next, the standard of reasonableness is objective, which, in a sense, is obvious; but that does not determine what the standard is to be. That selected in the reported decisions is the standard of the reasonable person in the claimant's position. One does not know why, and there are arguments against that too (*e.g.*, it might be that what is reasonable must be looked at from the ministry's point of view). In any case, it does not get you anywhere until you know what the attributes of the reasonable person are. The reasonable person is not identified in the reported decisions. He might be the average person, the average claimant, the prudent claimant, or one of several other types. In their 1952 report on time limits,[7] the National Insurance Advisory Committee state that these should not "be so strict as to prejudice what is in our opinion a basic principle of any contributory insurance scheme, namely, that when a person experiences a contingency against which he is insured, he should not be precluded from drawing the appropriate benefit by any act or default on his part, for which the ordinary man would hold that he had a good excuse." The decisions identify the standard no more closely than as that of the reasonable person. How does the commissioner or umpire know what that creature would do in the circumstances of a given case? Experience? Or does the adjudicator consider what he himself would do? Is reasonableness the standard of the intuitive commissioner? It is not known, and a search on the Clapham omnibus will not help. What is known, however, is that the standard is in some respects very high. This is strikingly illustrated by the ignorance cases.[8] The reasonable

[7] Cmd. 8483, p. 9.
[8] *Cf.* Cmd. 8483, pp. 9–11.

person who is firmly (but erroneously) convinced that he knows the rules of the scheme is simultaneously aware of his own ignorance, so he goes straight along to the local national insurance office to check up. Could it be that when faced with a plea of good or reasonable cause for delay, the adjudicator makes a common-sense guess as to what is the fair and convenient way of holding an even hand between the claimant and the ministry? Do the commissioner and umpire, after all, interpret words without fulfilling the objects for which adjudication on social security legislation was withdrawn from courts of law?

One of the reasons for giving jurisdiction to administrative tribunals was to secure informality, and great progress has been made in this direction. Another reason was suspicion of the way judges interpreted social security legislation. One of the objects sought to be achieved was greater attention on the part of the adjudicator to the policy of the legislation. That is not to differ from the commissioner who said (C.S. 50/50): "The claimant's rights under the National Insurance Scheme do not depend upon official policy or upon matters which are peculiarly within the knowledge of the Ministry, but upon the legal interpretation of the National Insurance Acts and the regulations made thereunder. . . ." These rights depend upon interpretation in the light of the legislative policy aimed at by the Acts.

"Reasonable" and "good" are not words whose meaning is constant. To find out what they mean in the Acts means finding out what they were put there for. That involves asking why time limits were prescribed for claiming benefits. This would be gathered primarily from the Acts and regulations, but there are no inhibitions about evidence and legislative history could be invoked. (In point of fact, this is unhelpful—Parliament seems to have thought "good" and "reasonable" sufficient guidance for the adjudicator.) Once it has been ascertained why there are time limits, then—subject to any argument that "good" and "reasonable" differ—a good or reasonable cause for delay should be one which does not conflict with that policy, or which brings in some element overriding that policy. That is to say, where there is cause for delay, the late claim should be allowed if to disallow it would not further the policy for whose furtherance the time limit was enacted, or if to allow it would further some policy considered to outweigh in desirability the policy behind the time limit. While the onus of proof that there was good or reasonable cause for delay is doubtless with the claimant, it must be remembered that he is not trying to make out a deserving appeal to charity but asking the arbitrator to construe legislation regulating rights for which he has paid.

Time Limits

Time limits for claiming may have been introduced for one or more of the following reasons:

(a) To put an obstacle in the way of fraudulent claims by making sure that the ministry can investigate the facts at the time of the event out of which the claim arises or shortly after.
(b) To further administrative convenience. A pretty constant rate of insured happenings can be assumed, and a short time limit will on that assumption ensure a pretty constant rate of claims.
(c) To save the fund money.
(d) To make sure that anyone who might otherwise be in doubt whether to claim or not decides, without time to reflect, in favour of claiming.
(e) To keep people up to scratch by putting in an arbitrary but entertaining rule, like two spades overcalls two hearts.

There is no evidence that (d) was intended by the legislation. A person who believes his employer will pay him full wages during sickness, and makes no claim until he finds he is mistaken, has no good cause for his delay on the authorities. So he should claim immediately on being taken ill in case he turns out wrong about his employer; and even though he does not want the insurance money in the event of getting full wages he is unlikely to give it back once claimed. The result is to encourage people to resort to the fund when, but for the reported decisions, they might not have done so. Similar arguments apply to the decisions that it is not good cause for delay to believe that the employer will pay sickness benefit, to think that a sickness will be of very short duration, to expect to be unemployed for only one day, or for any other reason to expect to be able to save the insurance fund. Arguments could be put up to support the view that insured persons should always claim when entitled even if they do not really want or expect to want the money, but that does not seem to be the policy behind the legislation governing time limits for claiming.

Suggestion (c) can be correct only on the assumption that Parliament hoped for late claims and that regulations were framed so as to make as many claims late as possible.

Probably (a) and (b) between them supply the main answer. The former is the policy of statutes of limitations. The Recorder of Londonderry, sitting at Coleraine County Court [9] on a workmen's compensation case in 1909, said that service of the notice as soon as practicable after the accident was prescribed for the purpose of preventing fraudulent claims. In *Armstrong* v. *Canada Atlantic Ry.*,[10] Osler J.A., giving the judgment of the Ontario Court of Appeal, said: "The object of the notice is to protect the employer against stale or manufactured or imaginary claims, and to give him an opportunity while the facts are recent of making inquiry into the cause and circumstances of the accident. The several clauses

[9] *M'Clelland* v. *Todd*, 2 B. 472.
[10] (1902) 4 O.L.R. 560, 567–568.

which bear upon the subject are very loosely fitted together, but the stringency of the original provision has been much relaxed, and the injured workman is evidently the first object of the legislature's care." Convenience of administration did not enter into workmen's compensation, and that must probably be considered under national insurance. The National Insurance Advisory Committee, in their 1952 report on time limits,[11] alleged these were necessary "to protect the Insurance Fund against stale and doubtful claims, and to secure speed and economy in administration."

A late claim does not conflict with policy (a) where there is no doubt about the facts, and should be allowed unless it upsets the administration of the scheme. Even where there is doubt about the facts, allowing a late claim may further some policy preferred to policy (a). No late claim would ever be consistent with policy (b), so one for which there was good or reasonable cause must be one whose acceptance furthers some policy whose desirability outweighs that of (b). Thus the probability is that a cause is good or reasonable for this purpose if it is such that (1) there is some policy which would be furthered by allowing the claim to be made, and which is preferred by the legislation to the policy of securing convenient administration, and (2) either (i) allowing the claim to be made could not so far as is discernible lead to fraud or (ii) allowing the claim to be made furthers some policy preferred by the legislation to the rigorous safeguarding against fraud provided by the time limit for claiming. The adjudicator faced with any proved cause for delay should ask himself whether it satisfies these requirements. In each case the policy he chooses should be the one he thinks intended by the legislation to be predominant, or which predominates according to its spirit. Commissioners and umpires should avoid sweeping generalisations as to what causes are reasonable or good. If they confined their reasoning to the selection of the policy to be applied in the case before them they would give local tribunals and other subordinate determining authorities much more valuable guidance than is given by their present type of decision. When using such flexible expressions as "good cause" and "reasonable cause" Parliament intended to give the adjudicators a policy discretion. The appellate body of last resort has no mandate to ossify it.[11a]

There remains in this connection the question of whether there is any distinction between good (national insurance) and reasonable (industrial injuries) cause for delay. The authorities regard them as identical. Ministry papers dealing with claims use the two expressions interchangeably under each Act. Two words can mean

[11] Cmd. 8483, p. 9.

[11a] See the debate in the House of Lords (175 Hansard cols. 516–550) on the astonishing position revealed by Lord Chorley (cols. 516–532). No effective reply was made, and nothing was done about it.

the same thing, though in this case one might seem at first sight to look for intelligence and the other morality. In any case, why are the two used? The National Insurance (Industrial Injuries) Act, 1946, can trace its "reasonable" back to the Workmen's Compensation Acts (reasonable cause) and to the old national health insurance scheme (reasonable excuse). The National Insurance Act, 1946, will find the parentage of its "good" in the old Unemployment Insurance Acts. Today the schemes are so similar in structure, and the prescribed time provisions in each so generally alike, that it is difficult to see what differences could have been intended in the types of relieving causes for delay. Moreover, Parliament appears to have thought the provisions identical. Apart from "good cause" and "reasonable cause," Acts in the Commonwealth and United States of America have referred to "unforeseen cause," "reasonable excuse," "satisfactory reason" and "sufficient reason." All these expressions have received similar treatment. This supports the view that contemplation of policies and not of words will provide the guide for deciding cases.

Critical Analysis

The hypothesis here is that the policy approach will restore discretion and that it is inappropriate to lay down general propositions as to whether a cause put forward in a particular case will be good or reasonable in future cases. Of course, the commissioner's or umpire's judgments will be taken as precedents. But in a case for example, in which ignorance is held not reasonable cause, the precedent value should be not so much on the issue of whether ignorance is reasonable cause as on the policy considerations to be taken into account by later adjudicators faced with a plea of ignorance. Accordingly, it is not proposed here to suggest what causes should be held or not held to validate a late claim. What is suggested, however, is that some of the decisions should have been different. A couple of examples will illustrate the theme. The fact that in most respects decisions have been uniform in many countries under many schemes embodying many forms of words interpreted by many types of adjudicators should not be given too much weight in favour of their correctness. Much of the uniformity is due to widespread citation of English workmen's compensation cases.

In the ignorance cases it has been far too difficult to establish good cause. It may be desired to train people who are in doubt about their rights to inquire at the ministry's offices or of a solicitor. To that end it may be correct to hold there is no good cause where a person acts on gossip or does not trouble himself to investigate at all. But it must be remembered that many claimants (and especially those who plead ignorance) are ill-educated, many are dull-witted or mentally retarded, many are

sick or worried at the material time. The scheme is a complicated one, the S.I.s and S.R. & O.s are not much easier to understand than the explanatory memoranda issued with some of them, and the ministry's pamphlets are not automatic reading (and it is unrealistic merely to say they ought to be) for this class of person. If someone who suffers an industrial accident has never heard of the insurance scheme, or has not heard of the existence of a prescribed time for claiming, one of the policies to be taken into account is that of protecting him and his dependants from his own incompetence. If there is no doubt that the relevant injury arose out of and in the course of insurable employment, it may be better to pay injury benefit on a late claim than to send the claimant to the National Assistance Board. Sloughing off the claim for injury benefit because it is late may appear doubly absurd where the facts are so plain that the accident founds a common law claim for damages, for which the period of limitation is much longer. Paltry economies should not be purchased at the price of a justifiable sense of injustice. The Australian attitude to ignorance [12] is closer to realism. There are indications that the stricter rule operating elsewhere has been accepted with such docility partly on account of the confidence of its first proclamation and partly because of the widely disseminated illusion that the common law has a general principle "ignorantia juris haud excusat," from whose sacred wisdom this rule is inevitably deduced.

Leniency, on the contrary, has been too easily accorded to those who employ delegates (*e.g.*, probating solicitors in claims for death grant), and where the delegate bungles the claim. It is not as obvious as it might seem that the claimant has good cause for claiming late where the agent has not. The fact that the client can sue the solicitor in the death grant cases for negligence or equitable fraud is a factor which ought to be taken into account against allowing the claim to be made late.

In short, an abandonment of addiction to grammar and logic, of declaratory manifestoes of statutory appearance when giving judgment, of rigorous application by inferior adjudicators of the merest *obiter dicta* in earlier cases of superior adjudicators, and replacement of these methods by a sincere and searching (and grammatical and logical) investigation of the policy questions implicit in each case, will shake up the present received doctrines. If this is not done, administrative justice (at least in national insurance and industrial injuries cases) will go the way of equity under Lord Eldon. If it is done, a vital discretion will revest in the adjudicators. Harsh decisions make bad law.

L. A. Sheridan.*

[12] See p. 352, *ante*.

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BRITISH TRANSPORT COMMISSION *v.* GOURLEY [1]

THIS case posed the question of whether tax should be deducted from compensation for loss of income. The decision—that tax should indeed be deducted—will in many instances change the amount of damages to a dramatic extent; further, the new principle may possibly be stretched in the future to cover loss of office and even compulsory acquisition. Accordingly, some comment by an accountant on the arithmetic of this case, and on its implications, may not seem altogether out of place.

FACTS

The respondent, Mr. H. J. F. Gourley, was severely and permanently injured while travelling by train on September 21, 1951, owing to the negligence of the appellant's servants. He was sixty-five years old at that date, and, as senior partner in a firm of civil engineers, was earning a high income. For some months after the accident he was unable to take part in the firm's business. On his return to work an abatement was made—because of his disabilities—in his share of the profits; accordingly, from the date of the accident to the end of 1953 (just before the action for recovery of damages) his earnings were greatly reduced. Moreover, the firm's profits seemed likely to fall in future years because of his diminished working powers; and so his prospective earnings (from the trial until his hypothetical retirement date) might well be lower than they would have been but for the accident. Nevertheless, his expected income—despite his handicaps—still appeared large enough to attract surtax "at the highest rate."

The trial took place in March, 1954, and Pearce J. awarded damages of £47,720. Authorities binding on him and the Court of Appeal required him to ignore tax in assessing the respondent's loss of income, *i.e.*, the damages under this head were estimates of gross income lost, regardless of the fact that tax would have been paid on this income had it actually been received. As the appellants wished to bring this matter before the House of Lords, they requested Pearce J. to make alternative findings of the damages due if tax was deductible. The resulting analysis may for convenience here be shown as follows:

[1] [1956] A.C. 185.

	Gross amount £	*Tax on earnings* £	*Net amount* £
(*a*) Loss of earnings			
1951–3 (*i.e.*, till trial)	15,220	10,275	4,945
1954– (*i.e.*, prospective)	22,500	20,750 [2]	1,750
	37,720	31,025	6,695
(*b*) Pain and suffering	9,000	—	9,000
(*c*) Out-of-pocket expenses	1,000	—	1,000
	47,720	31,025	16,695

All these figures were accepted as correct. Items (*b*) and (*c*) were not challenged; the question under appeal was whether the judge ought to have taken account of tax in assessing (*a*), and so should have awarded £6,695, not £37,720, under that head.

It was agreed by both sides that the respondent would incur no tax liability on the award of either £6,695 or £37,720.

Reasoning

According to the judgments delivered in the House of Lords, the principle to be followed in assessing the damages is not in doubt: the injured person should get "such a sum as will, so far as possible, make good to him the financial loss which he has suffered and will probably suffer as a result of the wrong done to him" (Lord Reid). Plainly, such a calculation must often be fantastically difficult, uncertain, and arbitrary—and all the more so when prospective earnings of the distant future are at stake. Yet, however rough-and-ready the estimate may be, the court has to assess damages as a lump sum once and for all.

There is, however, a qualification to the principle. The loss suffered, and any compensatory gains, must not be too remote in the chain of consequences. The problem before the court in this case was therefore whether tax on income is too remote and uncertain to be taken into account.

When one reflects on the importance of tax, this problem seems to have featured in surprisingly few earlier cases. In these, the decisions (with one exception) all favoured the view that tax should be disregarded in assessing damages. Thus, Lord Keith in *Blackwood* v. *Andre* [3] examined the argument that the injured person's

[2] The increase in the rate of tax, as between the pre-trial and post-trial incomes, can perhaps be explained as follows. Suppose that a man was earning £10,000 a year; and that, after his accident, his income is zero in the first year, and then is £9,000 for the next ten years. Under a system of progressive taxation the average tax rate applicable to the £10,000 lost in the first year will be much lower than the rates applicable to the £10,000 lost over the next ten years; for the latter £10,000 consists of the top slices of each year's income, which attract tax at the stiffest rate.

[3] 1947 S.C. 333.

loss is merely the net sum that he would receive after deduction of tax, and decided that this view is illegitimate. "It would apply on the same grounds where a person had come under obligation to pay a proportion of his income away to somebody else. The fact that he would then be left with a net sum does not appear to me to be any reason for basing the assessment of damages upon the net sum which he would receive or retain and not upon the gross sum which should be paid to him and from which he would make the conventional deduction to which he had become bound. Further, the argument seems to ignore the fact that the only person who is going to benefit is the person who is liable in damages. There is no suggestion that he will account to the Revenue for the capitalised income tax which *ex hypothesi* has been taken into account in assessing damages. The court, in my opinion, has no concern with the incidence of taxation in assessing the damages of an injured taxpayer. The argument rests upon a consideration of facts that really are *res inter alios acta*, and for these reasons the argument must, in my opinion, be rejected." The matter was decided in the same way by the Court of Appeal in *Billingham* v. *Hughes*.[4]

The one case in which a contrary view had been taken was *M'Daid* v. *Clyde Navigation Trustees*.[5] Here tax was not so belated and remote as when it falls on profits; it was actually deducted from the income, for the injured person was a workman whose wages were subject to P.A.Y.E. Lord Sorn stated that to ignore the tax position at the present day was to be out of "touch with reality"—a phrase that echoes through the House of Lords judgments.

Counsel for Mr. Gourley put great stress on the remoteness argument. Income tax on profits is not usually paid until a year or more after the money has been earned; surtax is paid at an even later date. To estimate the future tax rate of the particular taxpayer is not easy, particularly as the rate will vary with personal and changing factors—such as the wife's earnings, covenants to pay annual sums to third persons, and so on. If based on net income, damages would thus vary greatly with the peculiarities of each taxpayer's circumstances. Further, if the chain of relevant consequences is to be lengthened till it includes tax, why should not regard be paid to other financial circumstances, *e.g.*, the injured man may have to give up his life insurance policy, or sell investments and real estate at a loss.

Counsel for the Transport Commission argued that the award is not a penalty, and therefore its only measure is fair compensation to the injured man for his losses. The man's gross income is part of the evidence, but so also are any disadvantages that go hand-in-hand with the income, such as expenses and liabilities; and the

[4] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.
[5] 1946 S.C 462.

disadvantages must include tax imposed by statute. The *balance* between the gross income and its disadvantages is what is to be made good; if the injured person receives more than this balance, he reaps a profit from his accident. It is incorrect to assume—as was done in *Billingham* v. *Hughes*—that the defendant is in the position of a person who contracts to replace lost earnings.

Six of the seven judges accepted the appellant's argument. While some part of their speeches was given up to a survey of the earlier cases, their reasoning was not legalistic in any narrow sense; rather did it deal with the general problem of whether, under present-day conditions, tax is so remote and insignificant that it should any longer be left out of account in assessing lost income.

Three of the judges touched on the difficulties of calculating tax. Their opinion was that the calculation must of necessity be inexact; "but such an estimate will be none the worse if it is formed on broad lines, even though it may be described as rough and ready. It is impossible to assess with mathematical accuracy what reduction should be made by reason of the tax position just as it is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury itself and for the pain and suffering endured" (Earl Jowitt).

The dissenting judgment was by Lord Keith of Avonholm. His argument was that the tax position of an injured person is no concern of the wrongdoer, and ought not to lessen the damages. A wrongdoer is not allowed to say that the injured person does not need full compensation because he has a wealthy wife or an independent income. "The law would say the wealthy wife and the independent income are not his concern. But by taking net income after payment of tax as the measure of damages the wrongdoer achieves by a back door precisely what is refused to him by the direct entrance." Further, to bring tax into the picture is to introduce many difficulties and complexities; for instance, if the injured person is a foreigner, British courts would have to pay regard to an alien tax system.[6]

Comment

The whole case manifestly turned on the question of whether, as a matter of common sense, tax is so closely bound up with earnings as to demand inclusion in any estimate of the loss suffered when a man cannot work. The expenses normally charged in his profit-and-loss account ought to be deducted from gross income in computing his true loss; and the tax that he must inevitably pay, as a direct result of earning his net profit, also seems a strong candidate for deduction. It is not "income after expenses" but "income after tax" which gives a man his spendable income.

[6] One can speculate on the labours that might follow the crash of a British aircraft full of assorted foreigners.

In the modern world, this has surely become part-and-parcel of our attitude to income. Further, it is a commonplace, to anyone possessing even a nodding acquaintance with business, that tax must be kept prominently in mind when almost any kind of financial decision is to be made. In these circumstances, one can hardly suppose that any group of knowledgeable men, if they were asked to comment on the issues of the *Gourley* case, would have been likely to leave tax out of an unbiased calculation.

An imperfect knowledge of the facts of the *Gourley* case might however suggest that the decision somehow involved the deduction of tax twice over, and so was unjust. There was not, in those particular circumstances, double deduction. But in other cases, with different circumstances, the danger might be real.

Let us use figures to illustrate the point. Suppose that an injured man loses £1,500 per annum of gross income, and that he pays tax on this marginal slice of income at an average rate of 6s. 8d. in the £, so that his net loss is £1,000 per annum.[7]

It will be convenient to distinguish three ways in which his compensation money might be "invested" by the injured man: (a) he might simply deposit this capital receipt in, *e.g.*, a bank, and then gradually withdraw the capital and treat it as income; (b) he might use the compensation to buy shares, and then live on the dividends; or (c) he might buy an annuity.

(a) *Capital treated as income*

Suppose first that the injured man's circumstances approximate to those in the *Gourley* case: he is already sixty-five, is expected to retire in a short period of say five more years, and so—given our imaginary figures—loses a total future income of £7,500 gross, or £5,000 net. Following the *Gourley* decision, he will receive £5,000 as damages. This money will not be taxed; so he can put the whole £5,000 in the bank and then withdraw it at the rate of £1,000 each year. He thus consumes capital over the five years, and pays no tax on the sums withdrawn; his spendable income for the period is the full £5,000, as it should be. He might in fact get rather more than £5,000, if he took the obvious step of depositing his damages at interest. This extra receipt (which might well attract tax) is not large where the period to retirement is relatively short. But in all cases the interest factor will lessen the lump sum which the defendants should pay; though the injured man keeps the money under his own control, his cash position over the five years will have the same advantages as if he had bought a five-year annuity-certain. In the *Gourley* case, the trial judge made a deduction (based on the 4 per cent. tables) of about one-ninth as a fair allowance under this head; tax on the interest was apparently

[7] Doubtless no real case would be concerned with a tax rate so straightforward as this. For instance, the switch from profits to interest (on the compensation) may bring a limitation in earned income relief.

ignored—despite Mr. Gourley's high tax rate, which would reduce his effective receipts of interest almost at zero.

(b) *Income derived from dividends, etc.*

Now consider a different case in which the time period is much longer—say, the injured man is still only thirty, and is expected to lose forty years' income. If he is presented with all his income as a lump sum in advance, he will feel more than satisfied, even though he receives forty prepayments of his net income (£40,000), and not of his gross income (£60,000). With such a long span of years ahead of him interest is no longer somewhat insignificant as in (a). He will invest his £40,000 in shares or other securities; these may, on a 5 per cent. basis, yield him £2,000 a year. True, the £2,000 will be taxable, and so he will (on our assumption that his tax rate is 6s. 8d.) be left with only £1,333 to spend each year. He is still better off than if he lets his capital lie idle till he consumes it at the rate of £1,000 per annum; further, he has the full £40,000 left when he reaches seventy (and a larger sum if continuing inflation has pushed up the money-value of his equities).

Here it would not seem unfair to award a smaller lump sum. Its amount should, however, be big enough to allow for the deduction of tax from dividends, *i.e.*, it should yield a gross income of £1,500. Investments costing £30,000 would, on our assumptions, be enough to yield that income. After deducting tax from his £1,500 of dividends, the investor would be left with a spendable income of £1,000. To reduce the damages to below £30,000, by subtracting tax, would indeed be double deduction, and would leave the investor with less than the agreed figure of £1,000 as spendable income.

Thus, as the expected life grows longer, a point is reached at which it pays the defendants to abandon a literal interpretation of the *Gourley* case, and to offer instead a lump sum that yields the full gross income.

(c) *Income derived from an annuity*

The clash in methods under (a) and (b) above can be resolved if we refine the discussion by bringing in annuities. In (b), as in (a), the defendants might well argue that they would satisfy justice by paying the present value of an annuity-certain, *i.e.*, the sum with which the injured man could buy an annuity to run for a stipulated number of years. This arrangement would reduce the damages; in our examples, the purchase price of the five-year annuity of £1,000 would be (on a 5 per cent. basis) £4,330, and that of a forty-year annuity only £17,159. However, part of each year's instalment of £1,000 might be treated by the Inland Revenue as interest, and taxed. This interest-content is usually regarded as varying over the years; in the first instalment it is at its maximum (and is large relative to the £1,000 where the annuity

will be paid over a long period), and it sinks in each subsequent instalment till it reaches a negligible sum in the last instalment. Provided the compensation is increased to a point at which the net annuity (after tax) is still £1,000, on average over the years, the argument for the annuity-certain has plausibility.

However, the defendant might now carry the argument a step further, and take expectation of life into account. The cost of the £1,000 annuity would sink if the insurance company had to pay it only till the annuitant reached seventy or to his earlier death; in the case of the man aged sixty-five the damages would fall to about £3,332, and in the case of the man aged thirty to £16,328. Prior to the proposals of the 1956 Finance Bill (under discussion at the time of writing) there was a grave objection to this approach; for the whole instalment of a life annuity (and not merely its interest-content, as with the annuity-certain) was normally treated by the Inland Revenue as revenue, and so tax was paid on the whole £1,000. If the Chancellor's new proposals become effective, this objection will presumably vanish, and the interest-content alone will be diminished by tax.

We have so far assumed retiral date to be the limit beyond which the annuity should not run. In some circumstances, however, the annuity should presumably run till the injured man's death, even if he lives to a hundred; where a post carries a pension, or the injured man will still need costly care after he retires, some or all of the annual payments might well continue so long as he lives. This would raise the cost of the life-annuity—in our two imaginary cases, to about £9,080 and to £17,060 respectively, for yearly instalments of £1,000.

An annuity that is terminated by death seems at first sight to resemble closely the stream of lost earnings, and so to be admirable as compensation. But it has one serious disadvantage (even if the burden imposed on it by the Inland Revenue is lightened). When an inflation takes place, profits and salaries tend to rise in step with prices, so that real income is maintained. Accordingly, damages for lost earnings—it can surely be argued—will be inadequate if they do not allow for the likelihood of changing price-levels; to ignore inflation nowadays seems fully as "out of touch with reality" as to ignore tax. The injured person might perhaps be content if his compensation was based on a scale of earnings higher than that prevailing at the award date; but a more satisfactory scheme would be one that let him invest a substantial sum in highly geared equities, so that he would have some prospect of maintaining his real income as prices rise. If this reasoning is accepted, an annuity (whose instalments are rigidly fixed in terms of money) is far too speculative for a man with a long life ahead. Whether or not a court would accept this argument is another matter; however, it unquestionably provides the only safe method for investing whatever compensation is received.

The above paragraphs boil down to a simple enough rule. The injured person should have as much to spend after the accident as before it. Where he will consume the actual lump sum awarded as compensation, tax can reasonably be deducted in fixing its amount. The amount can also be reduced where—because enough time passes between the award date and his spending of the money—the lump sum will itself be a source of earnings; but this deduction must be limited to allow for tax levied on the earnings by the Inland Revenue, *i.e.*, the discount rate used in the calculation should be the net rate left after the particular individual has paid tax.

Other Types of Case: Unearned Income

What light does this analysis throw on cases other than those for accident damages?

When compensation is paid for *loss of office*, the argument appears to be on all fours with what has been said above—provided that the lump sum is again not taxed by the Inland Revenue. Normally it is exempt,[8] being regarded as the capital equivalent of the lost future income. The *Gourley* decision has in fact been applied in *Beach* v. *Reed Corrugated Cases, Ltd.*[9] But it was here qualified in an important respect. The plaintiff's income was made up of (a) salary and fees from employment, and (b) a large private income from disposable investments (an element that seems to have been left out of account in the *Gourley* case). If (a) alone was considered, the tax rate was roughly 11s. in the £; if (b) also was considered, the rate rose to about 18s. The size of the award by Pilcher J. shows that he felt the appropriate rate to be much nearer 11s. than 18s., *i.e.*, that little regard should be paid to income of type (b) in estimating general damages.

In cases of *compulsory acquisition of property*, the reasoning of earlier pages again seems applicable; and, happily, this reasoning also fits in with the rules for valuing assets in normal cases. The loss of an asset usually involves loss of profits or other income, not for some limited term such as the years till the owner's retirement, but for an indefinite future period. The lost asset can be looked on as the capital that yields a perpetuity. Its fair value in the eyes of the dispossessed owner is presumably the amount that will, when reinvested in another asset carrying equal risks, yield the same receipts for as far into the future as the eye can reach. The whole of each year's receipts will be income, and taxable. So the compensation must not be diminished by deducting tax; the facts have here narrowed down until they somewhat resemble those assumed in case (b) on p. 370 (where the injured person lives on dividends). Or, to put the matter in another way, asset values

[8] *Henley* v. *Murray* [1950] 1 All E.R. 908.
[9] [1956] 1 W.L.R. 807.

fixed by the market or an appraiser have already been reduced to allow for the tax that will be levied on the asset's fruits, and must not be reduced further.

The analogy with a perpetuity may not always be apt. The diminution in the owner's income, following the loss of his asset, may seem likely to be temporary—for instance, the asset may be of the wasting type. Here the compensation should be regarded as an annuity-certain for a limited number of years. The *Gourley* decision has already been applied in a case that savours somewhat of this situation,[10] though in fact it was for *trespass* and *conversion*; compensation for loss of one year's rent of farm lands was restricted to the rent less tax (and, as the plaintiff was a company, " tax " here meant income and profits tax); damages for loss of a hay crop, etc. (being themselves possibly subject to tax by the Inland Revenue), were not restricted.

W. T. BAXTER.*

[10] *Hall* v. *Pearlberg* [1956] 1 W.L.R. 244.

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A *JUS QUAESITUM TERTIO* BY WAY OF CONTRACT IN ENGLISH LAW

FORTY years ago, in the House of Lords in *Dunlop* v. *Selfridge*,[1] Viscount Haldane L.C. laid down dogmatically that our law knew nothing of a *jus quaesitum tertio* arising by way of contract. Since that pronouncement English judges [2] and textbook writers [3] have accepted it as a sound statement of the positive law of England regarding contracts which contain promises for the benefit of third persons, subject to well-established exceptions such as agency, assignment, negotiable instruments, constructive trusts, covenants running with land and certain contracts now governed by particular statutes. But more than twenty years ago a vigorous attack was launched upon this statement of principle by Professor Corbin.[4] In 1937 the Law Revision Committee, under the chairmanship of Lord Wright, criticised adversely the principle in question and recommended a substantial alteration in the law by statute.[5] But while Parliament has remained silent on the subject, since the war in the courts some judges have been reconsidering the principle. Since 1949, in a series of cases in the Court of Appeal, Lord Justice Denning has been elaborating a doctrine of third party rights arising by way of contract, and in 1954 in a High Court case Mr. Justice Devlin adopted and followed this doctrine. In this paper it is proposed to examine this latest judge-declared doctrine, first considering in isolation the dicta outlining it, then examining them in the context of the cases and then with regard to relevant precedents, with the object of determining the authority of the dicta. In the latter part of the paper it is proposed to

[1] [1915] A.C. 847, at p. 853.

[2] *e.g.*, *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70, at p. 79, *per* Lord Wright; *Harmer* v. *Armstrong* [1934] Ch. 65, at p. 86, *per* Lawrence L.J.

[3] Anson on *Contract*, 16th ed. (1923), at p. 279; Cheshire and Fifoot on *Contract*, 4th ed. (1956), at p. 366.

[4] "Contracts for the Benefit of Third Persons" (1930) 46 L.Q.R. 12; see also (1933) 49 L.Q.R. 474, and *Current Legal Problems*, 1955, 131.

[5] Sixth Interim Report, Cmd. 5449, section D. The Committee formulated two proposals for legislation: paras. 48 and 49—

(i) "Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise as against the third party any defence that would have been valid against the promisee. The rights of the third party shall be subject to cancellation of the contract by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct."

(ii) That the Married Women's Property Act, 1882, s. 11, be extended to cover "all life, endowment and education policies, in which a particular beneficiary is named."

consider the subject of the *jus quaesitum tertio* comparatively and on principle, in an attempt to determine whether this doctrine is a desirable development in our law.

* * *

Lord Justice Denning's doctrine of third party rights created by contract is set out in his judgments in three Court of Appeal cases: *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*,[6] *Drive Yourself Hire Co. (London), Ltd.* v. *Strutt and Another*,[7] and *Adler* v. *Dickson and Another*.[8] In the first-mentioned case,[9] the doctrine was propounded in these general terms—

> "... a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences which may be open on the merits."

Devlin J. referred to the doctrine in *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.*[10]—

> "There is nothing novel about the idea of a third party coming in to enforce a contract ... as a beneficiary. Denning L.J. in ... (*River Douglas* case, *supra*) reviews the main categories into which such third parties commonly fall."

and later, at p. 426, the learned judge added—

> "This is the sort of situation that is covered by the wider principle; the third party takes those benefits of the contract which appertain to his interest therein, but takes them, of course, subject to whatever qualifications with regard to them the contract imposes."

The doctrine has not been left by these judges in this very general form. They have instanced its numerous particular applications to concrete situations.[11]

> *Example No. 1.* A covenant made with the owner of land, for its benefit, runs with the land so as to be enforceable against the covenantor not only by the original covenantee but also by his successors in title and by persons deriving title under them.[12]
>
> *Example No. 2.* An assignee of the benefit of a contract,

6 [1949] 2 K.B. 500.
7 [1954] 1 K.B. 250.
8 [1955] 1 Q.B. 158.
9 [1949] 2 K.B. 500, at p. 514.
10 [1954] 2 Q.B. 402, at p. 422.
11 So far as the following examples can be supported by authorities the latter will be cited in each note within square brackets.
12 *River Douglas* case, *supra*, at pp. 514 and 516, *per* Denning L.J. [*The Prior's Case* (1369) Y.B. 42 Edw. 3, pl. 14, fol. 3 A; Coke on *Littleton*, at pp. 384a *et seq.*; *Rogers* v. *Hosegood* [1900] 2 Ch. 388; Law of Property Act, 1925, s. 78 (1); *River Douglas* case, *supra*, *per curiam*].

if certain conditions are satisfied, enjoys a right to sue the original debtor.[13]

Example No. 3. An indorsee or named consignee under a bill of lading has a right to sue an original party to the contract of carriage.[14]

Example No. 4. The driver of a car may sue on the contract of insurance made by the owner of the car with an insurer which is expressed to cover the driver.[15]

Example No. 5. An undisclosed principal has a right to sue on a contract made by his agent for his benefit.[16]

Example No. 6. A widow to whom a pension was promised by her husband's employers under contract with him may sue the employers for the pension.[17]

Example No. 7. A man's servants and guests in whose favour an insurance policy has been taken out against loss by burglary may claim compensation under the policy.[18]

Example No. 8. When a third person is intended by the parties to a contract to take the benefit of a covenant *respecting real or personal property* he may acquire a right to that benefit.[19]

Example No. 9. A seller, in whose favour a commercial credit is issued by a bank under contract with the buyer, acquires a right to enforce the credit against the bank.[20]

Example No. 10. In contracts of insurance, both marine or non-marine, when the policy is taken out for those to whom the property "doth may or shall appertain," then the owner, even if he is not an original party, enjoys rights under the contract.[21]

Example No. 11. When a contract of *carriage of goods by sea* is made, and the carrier issues a bill of lading containing exemption clauses, if the parties so intend, the rights thereto extend not only to the carrier but also to other persons engaged in carrying out the services provided for by the contract.[1]

[13] *Pyrene* v. *Scindia*, *supra*, at p. 423, *per* Devlin J. [Law of Property Act, 1925, s. 136 (1)].

[14] *Pyrene* v. *Scindia*, *supra*, at p. 423, *per* Devlin J. [Bills of Lading Act, 1855, s. 1].

[15] *River Douglas* case, *supra*, at p. 516, *per* Denning L.J. [Road Traffic Act, 1930, s. 36 (4); *Tattersall* v. *Drysdale* [1935] 2 K.B. 174].

[16] *River Douglas* case, *supra*, at p. 515, *per* Denning L.J. [*Scrimshire* v. *Alderton* (1743) 2 Stra. 1182, *per* Raymond C.J.; *Rabone* v. *Williams* (1785) 7 Term Rep. 360n, *per* Lord Mansfield; *Drughorn* v. *Rederi A.B. Transatlantic* [1919] A.C. 203].

[17] *River Douglas* case, *supra*, at p. 515, *per* Denning L.J. [*sed quaere*?].

[18] *River Douglas* case, *supra*, at pp. 515–516, *per* Denning L.J. [*sed quaere*?].

[19] *River Douglas* case, *supra*, at p. 517; *Strutt's* case, *supra*, at p. 274, *per* Denning L.J. [*sed quaere*?].

[20] *River Douglas* case, *supra*, at p. 515, *per* Denning L.J.; *Sinason-Teicher Inter-American Grain Corporation* v. *Oilcakes and Oilseeds Trading Co., Ltd.* [1954] 1 W.L.R. 935 at p. 941, *per* Devlin J. [*Urquhart Lindsay & Co., Ltd.* v. *Eastern Bank, Ltd.* [1922] 1 K.B. 318].

[21] *Pyrene* v. *Scindia*, *supra*, at pp. 422–423, *per* Devlin J. [see Arnould on *Marine Insurance*, 14th ed., § 172; Marine Insurance Act, 1906, s. 14 (2); *Waters* v. *Monarch Fire and Life Assurance Co.* (1856) 5 E. & B. 870].

[1] *Adler* v. *Dickson*, *supra*, at pp. 181 and 184, *per* Denning L.J. [*Elder Dempster & Co.* v. *Paterson, Zochonis & Co.*; *Griffiths Lewis Steam Navigation Co.* v. *Paterson, Zochonis & Co.* [1924] A.C. 522].

Example No. 12. The above rule may apply also to contracts for the carriage of passengers by sea or land.[2]

Example No. 13. A third person beneficiary under a contract acquires a right to enforce the benefit when an intention on the part of the promisee to act as trustee for him can be discovered.[3]

Example No. 14. When a covenant is made under seal expressly for the benefit of a third person who is not a party to the deed, he acquires a right to enforce the covenant.[4]

Example No. 15. When A and B contract with regard to property belonging to T, and the property is likely to be transferred to A or B during the currency of the contract, the third party T takes those benefits of the contract which appertain to his interest.[5]

Example No. 16. When T sells goods to A, f.o.b., and A contracts with a carrier B for the carriage of the goods, so long as the property in the goods remains in T he is entitled to the contractual rights enjoyed by A against B so far as they affect his goods.[6]

In the four judgments under review several ramifications of the general principle were emphasised. Of course, the original parties to the contract must have intended or, at least assented to a term that the third person was to benefit.[7] Such a term will often be expressed in a contract, but it may be implied, *i.e.*, inferred from the facts.[8] It is not every intended beneficiary who would acquire rights, but only those who, in Denning L.J.'s phrase, "have a sufficient interest" to entitle them to sue.[9] Denning L.J. and Devlin J. did not attempt to define exhaustively what constitutes a sufficient interest, but were content to point to specific examples.[10] One major limit to the third party's rights is clearly stated, but not developed, in the *River Douglas* case: these rights exist only "subject to any defences which may be open on the merits."[11] Devlin J. elaborated this limitation when he stressed that the third person takes the benefits "subject to whatever qualifications with regard to them the contract imposes."[12]

* * *

[2] *Adler* v. *Dickson*, *supra*, at p. 184, *per* Denning L.J. [*Hall* v. *N.E. Ry.* (1875) 10 Q.B. 437; but *contra*, *Cosgrove* v. *Horsfall* (1945) 62 T.L.R. 140].

[3] *River Douglas* case, *supra*, at p. 515, *per* Denning L.J. [*Les Affréteurs Réunis Société Anonyme* v. *Walford* [1919] A.C. 801; the many cases are collected and discussed by Corbin in (1930) 46 L.Q.R. 12 and in Cheshire and Fifoot on *Contract*, 4th ed., 369–373].

[4] *Strutt's* case, *supra*, at pp. 273–274, *per* Denning L.J. [*Cooker* v. *Child* (1673) 2 Lev. 74; *Sunderland Marine Insurance Co.* v. *Kearney* (1851) 16 Q.B. 925; *Chelsea and Walham Green Building Society* v. *Armstrong* [1951] 1 Ch. 853; Law of Property Act, 1925, s. 56 (1); *Stromdale & Ball, Ltd.* v. *Burden* [1952] 1 Ch. 223].

[5] *Pyrene* v. *Scindia*, *supra*, at pp. 422 and 426, *per* Devlin J.

[6] *Ibid.*

[7] *Pyrene* v. *Scindia*, *supra*, at p. 426; *Adler* v. *Dickson*, *supra*, at p. 184.

[8] *Adler* v. *Dickson*, *supra*, at p. 184.

[9] *River Douglas* case, *supra*, at p. 515.

[10] *River Douglas* case, *supra*, at pp. 515–516; *Pyrene* v. *Scindia*, *supra*, at pp. 422–423.

[11] *River Douglas* case, *supra*, at p. 514. [12] *Pyrene* v. *Scindia*, *supra*, at p. 426.

These dicta outlining a doctrine of third party rights arising by way of contract considered in isolation present a startling contradiction of Viscount Haldane's famous aphorism, and if they correctly express the present law they reveal a remarkable development of the doctrine of privity of contract in English law. But to begin to consider whether they are good law it is necessary to consider them in the context of the four cases in which they were made.

The *River Douglas* case, *supra*, was the first in which the doctrine was propounded. In that case E. S., the owner of Low Meadows, land adjacent to a brook which was liable to overflow, entered into a contract under seal with the River Douglas Catchment Board in 1938. Under the contract the board undertook to make improvements in the banks of the brook to prevent future flooding, and to maintain them for all time, while E. S. was to contribute to the cost. The board did carry out work upon the banks, but in the opinion of experts—after the event—the work was doomed to failure from the outset. In 1946 the brook again burst its banks and flooded Low Meadows, and ruined the crops there. Given that the board had committed a breach of an implied contractual obligation, and the Court of Appeal so held, there was no doubt that E. S., the original contracting party, had a right of action against the board. But in 1940 E. S. had conveyed the land to J. S. with a term purporting to pass the benefit of the board's covenant, and J. S. had leased the land to a company, S. H. F., Ltd. J. S. and S. H. F., Ltd., thus strangers to the original contract, now sued the board for breach of the covenant. Both plaintiffs were successful in the Court of Appeal. Tucker and Somervell L.JJ. based their judgments on the well-established principle of covenants running with land coupled with the Law of Property Act, 1925, s. 78 (1). Denning L.J. reached the same conclusion and agreed with each part of his colleagues' reasoning. But Denning L.J. alone embarked upon an excursus into the law relating to third party rights in general arising by way of contract. He remarked on the principle of covenants running with land, *Example No. 1, supra*, as but one instance, cited several others, *viz.*, *Examples Nos. 4 to 9 and 13, supra*, and induced therefrom the general doctrine which is under examination. Whether or not this disquisition marks a turning-point in the history of privity of contract it is at least clear that it must be regarded as *obiter* in its original setting.

In *Strutt's* case, *supra*, the question of the range of privity of contract was not to the forefront. The real question before the Court of Appeal was whether an assignment of a flat made between T_3 and T_4 was lawful, within the ambit of Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3). Somervell, Denning and Romer L.JJ. all agreed that this particular assignment was unlawful, as it involved a breach of an obligation

between the original tenant, T_1 and the superior landlord, L. But Denning L.J. alone was prepared to go further and to hold that the transaction was unlawful for another reason: that T_3 had acted unlawfully by breaking an obligation in his sub-lease, namely, a covenant in favour of the superior landlord. Here the question of third party rights in contract first entered the judgments. In effect L was named as a beneficiary in a contract between T_3 and T_1, to which he was not a party. In Denning L.J.'s view such a case fell within the ambit of section 56 (1) of the Law of Property Act, 1925.[13] He proceeded to construe this section as enabling a third person beneficiary to acquire enforceable rights under any instrument (*i.e.*, even simple contract) in which a covenant respecting any property was made in his favour: *Example No. 8, supra.* This far-reaching construction of section 56 of the 1925 Act, and the attendant attack upon the orthodox doctrine of privity of contract will be considered later. Suffice it to note here that this part of the judgment simply established an alternative ground for holding that the assignment to T_4 was unlawful. Again it must be admitted that this exposition of the doctrine of third party rights by way of contract is not part of the *ratio decidendi* of the whole Court of Appeal.

In *Adler* v. *Dickson, supra*, the only question with which the Court of Appeal was concerned was as to the range of immunity conferred by an exemption clause in a contract of carriage of a passenger. The plaintiff contracted with a shipping company for a cruise in one of their ships. A ticket was issued to her which contained a term which expressly exempted the company itself from liability for negligence. The plaintiff suffered injuries during the period of the cruise allegedly the result of the negligence of the company's servants, the master and the boatswain. She took the novel course of suing not the company but the master and the boatswain. Were the latter, as servants of the company, entitled to the legal immunity set up by the exemption clause in the contract made between the passenger and the company? Pilcher J. in the court of first instance, and eventually the Court of Appeal (Denning, Jenkins and Morris L.JJ.), unanimously answered the question in the negative. In the appellate court it was common ground between all three judges that one insuperable obstacle prevented the defendants from enjoying in law the benefit of the immunity clause: in the contract they were not expressly nor by necessary implication named as beneficiaries. But Denning L.J. seized upon the carriage of goods by sea cases, such as *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd.*[14] and abstracted therefrom the rule mentioned above as *Example No. 11.*

[13] "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

[14] [1924] A.C. 522.

He found the explanation of this rule not in a series of collateral contracts between the owners of goods and those who handled them, nor in agency, but in the general principle that in certain circumstances a third person is entitled to enforce a contract made for his benefit, and referred back to his own exposition and examples of this principle in the *River Douglas* case, and to the judgment of Devlin J. in *Pyrene* v. *Scindia*, *supra*. From this general principle he deduced the rule cited above as *Example No. 12*. Applying the rule to the facts, the master and boatswain were not entitled to the benefit of the immunity clause as no term of the contract express or implied purported to confer such a benefit upon them. Clearly, neither the general principle nor the rule is the ratio of the court's decision, since only one out of three judges based his judgment upon them.

The fourth case, *Pyrene* v. *Scindia Navigation Co.*, *supra*, deserves closer examination as the principle of third party rights arising by way of contract, acknowledged by Devlin J. in his reserved judgment, cannot, it is submitted, be characterised as *obiter dicta*. The contract, the scope of which was in question, was made between I. S. D. (representing the Indian Government) and the defendant shipping company, it being a contract for the carriage of goods by sea on board the defendant's ship. A bill of lading incorporating the Hague Rules and thus including a limited liability clause, was issued shortly after the contract was concluded. Antecedent to this contract of carriage I. S. D. had bought the goods, including a fire tender, under an f.o.b. contract from the plaintiff. The seller delivered the goods alongside the defendant's ship, and allowed the defendant to load them on board. While the fire tender was being loaded by the defendant's servants it was dropped and damaged. At the time of the accident the plaintiff, the seller, still retained the property in the goods. The plaintiff repaired the fire tender and claimed the cost of the repairs from the shipping company in tort for negligence as bailee. The defendant admitted liability in tort but pleaded that its relations with the plaintiff were governed by contract embodying the Hague Rules, including the limited liability clause. Devlin J. entered judgment for the plaintiff, but held that the defendant's liability was limited by contract. Several of the issues which were dealt with fully in the judgment concerned the interpretation of the Hague Rules and their applicability to these facts. All these issues were determined in the defendant's favour, so that it certainly could rely on the limited liability clause against a person who was party to the contract of carriage. But the cardinal question remained—was the plaintiff, *i.e.*, the seller and still the owner of the goods, privy to the contract of carriage? Devlin J. considered at some length the two principles which might possibly be relevant to the solution of this problem.[15] The one was the agency

[15] [1954] 2 Q.B. 402, at pp. 422–426

principle: a third person may come within the scope of a contract of carriage made by two others if one of the latter made the contract on behalf of and for the benefit of the third person. But if this principle applied in this case, he pointed out, the third person "cannot take the benefit without the burdens or enforce liability without limitation if the contract gives limitation." [16] The other—he called it a wider principle—is the third party beneficiary principle cited earlier but deserving repetition here in full:

> "There is nothing novel about the idea of a third party coming in to enforce a contract either as an undisclosed principal or as a beneficiary. Denning L.J. [in the *River Douglas* case . . .] reviews the main categories into which such third parties commonly fall. The principle is very familiar in mercantile contracts: *Walford's* case. . . . It is a principle which has constantly to be invoked where the property in the subject-matter of the contract is likely to be transferred during the currency of the contract." [17]

He added other instances, listed above as *Examples Nos. 2, 3 and 10*. Next he examined the facts of the case before him carefully to determine whether the inference of agency could properly be drawn. His interim conclusion was that "the inference [is] irresistible that it was the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him." Then the learned judge proceeded to resolve his doubt as to which of the two principles was applicable, deciding in favour of the second,[18] *i.e.*, the third party beneficiary principle:

> "If it were intended that he should be a party to the whole contract his position would be that of an undisclosed principal and the ordinary law of agency would apply. But that is obviously not intended; he could not, for example, be sued for the freight. This is the sort of situation that is covered by the wider principle; the third party takes those benefits of the contract which appertain to his interest therein, but takes them, of course, subject to whatever qualifications with regard to them the contract imposes." [19]

Thus, he concluded, the seller was a third party beneficiary to the contract of carriage, enjoying the contractual rights conferred by the Hague Rules, subject, however, to the clause limiting liability.[20]

What, then, is the *ratio decidendi* of *Pyrene* v. *Scindia*? On its broadest construction it is the "wider principle" set out above,

[16] *Ibid.*, at p. 422.
[17] *Ibid.*, at p. 422.
[18] In (1955) 18 M.L.R. 172, at p. 176, in a case-note, Mr. Treitel mistakes the judge's emphasis when he says the case was decided upon the agency principle.
[19] [1954] 2 Q.B. at p. 426.
[20] Devlin J. did go on to state that the same conclusion could be reached upon another ground—that a contract between the seller and the shipowner might be inferred from the facts, a contract embodying the shipowner's usual terms. But he added, unequivocally: "I do not think that solution fits so well the circumstances of this case. I do not accept it as the right solution." *Ibid.*, at p. 428.

and noted earlier as *Example No. 15*. On its narrowest construction it is the proposition noted earlier as *Example No. 16*.

This examination of the four cases in which Denning L.J. and Devlin J. have elaborated this doctrine of *jus quaesitum tertio* by way of contract reveals that all the dicta supporting it have been *obiter* until *Pyrene* v. *Scindia*, in which, in a limited form, the doctrine is essential to the decision. Of course, even *obiter dicta* of these two judges are not without authority.

* * *

Must the doctrine be abandoned in the face of the contradictory principle which Viscount Haldane pronounced in *Dunlop* v. *Selfridge*?[1] It depends on whether that pronouncement expressed the *ratio decidendi* of the House of Lords. The facts of that case need not be repeated here beyond saying that a price maintenance agreement was made between two dealers, under which one dealer promised to pay a third person, the manufacturer, a certain sum for every breach of the price maintenance obligation. The manufacturer attempted to enforce this promise but the House of Lords unanimously held that he was not entitled to do so. In his speech Viscount Haldane (disregarding the wise advice given by Lord St. Leonards over a century ago[2] that judges should not lay down abstract principles lest the inherent adaptability of English law be impaired) actually said:

> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request. . . . A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again [the principal] . . . must have given consideration. . . ."[3]

His conclusion, that in this case the manufacturer could not enforce the promise, was based on two grounds: the one, the first principle just mentioned: the other, lack of consideration. Of the other five judges, only one,[4] Lord Parmoor,[5] clearly based a similar conclusion on that first principle. The principle which is common

[1] [1915] A.C. 847.
[2] In *Egerton* v. *Brownlow* (*Earl*) (1853) 4 H.L.Cas. 1, at p. 239.
[3] [1915] A.C. 847, at p. 853.
[4] Lord Parker touched on this point, but only *en passant*, at p. 859.
[5] *Ibid.*, at p. 864. It is remarkable that neither Viscount Haldane nor Lord Parmoor cited a single authority in support of that principle.

to the speeches of all six members of the House—omitting reference to undisclosed agency, which was not found as a fact—is simply that a person who provides no consideration in return for a promise cannot enforce that promise. So, within the hierarchy of precedents, the first principle, supported as it is by only two out of six members of the House, is a dictum of high authority, but not absolutely binding on all English courts.

But the exponent of the doctrine of third party rights cannot so easily dispose of *Dunlop* v. *Selfridge*. Even if Viscount Haldane's aphorism is only a dictum, still the ratio of that case—the necessity of consideration moving from the person who seeks to enforce a promise by way of contract—remains a formidable obstacle. Third person beneficiaries will rarely be able to prove that they have provided consideration. Lord Justice Denning has not yet faced this difficulty.

Can the doctrine stand in the face of the principle of *Tweddle* v. *Atkinson*? [6] In that case, J. T. contracted with G. on terms that in consideration of the other doing so, each would pay a sum of money to J. T.'s son, W. T. The contract contained an express term purporting to empower W. T. to sue for these sums. As G. failed to pay, W. T. eventually sued G.'s executors for the sum promised. The Court of Queen's Bench entered judgment for the defendants. Nowadays this judgment is usually interpreted as laying down the principle that no one can sue on a contract unless he was a party to the original agreement [7]: Denning L.J. evidently interprets it likewise.[8] But looking to the various reports of *Tweddle* v. *Atkinson* [6] it is significant that, according to four versions of the judgments (*Best & Smith*, *Jurist*, *Law Times*, *Weekly Reporter*: *aliter Law Journal*) all the judges, Wightman, Crompton and Blackburn JJ., based their judgments squarely on the principle that no action can be maintained on a promise by a stranger *to the consideration*, and held that even a son is a stranger to consideration provided by his father. The court clearly relied on the old rule of Assumpsit [9] that consideration must move

[6] (1861) 1 B. & S. 393; 30 L.J.Q.B. 265; 4 L.T. 468; 8 Jur.(N.S.) 332; 9 W.R. 781.

[7] *e.g.*, *Barker* v. *Stickney* [1918] 2 K.B. 356, at p. 358, *per* McCardie J.; Cheshire and Fifoot on *Contract*, 4th ed., at pp. 361 and 365. Support for this opinion is to be found in an interjection to this effect in the course of the argument in *Tweddle* v. *Atkinson* credited to Crompton J. in 30 L.J.Q.B. 265, at p. 266, and in 8 Jur.(N.S.) 332, but which is not recorded in 1 B. & S. 762 *et seq.* nor in 4 L.T. 468 *et seq.* nor in 9 W.R. 781–782; and in a dictum in the judgment of Wightman J. reported in 30 L.J.Q.B. 265, at p. 267, but which is not recorded in the other four reports.

[8] *River Douglas* case, *supra*, at p. 514; *Strutt's* case, *supra*, at p. 273.

[9] In the earlier cases, *Bourne* v. *Mason* (1669) 1 Vent. 6 and *Crow* v. *Rogers* (1724) 1 Stra. 592, third person beneficiaries failed to enforce, *by way of assumpsit*, promises in contracts concluded by others, on the ground that the plaintiffs were strangers to the consideration. In *Price* v. *Easton* (1833) 4 B. & Ad. 433, a third person beneficiary failed for the same reason, *per* Denman C.J. and Littledale J.; however, Taunton and Patterson JJ. decided the case on the ground that the plaintiff was a stranger to the agreement.

from the plaintiff. Again it transpires that the principal obstacle to the third party rights doctrine is not that the leading cases preclude the possibility of a *jus quaesitum tertio* by way of contract, but that on the authorities even a *tertius* must provide consideration to acquire a contractual right.

Lord Justice Denning has himself attempted to dispose of the *Tweddle* v. *Atkinson* principle, in the sense in which he interprets it, in various ways. In the *River Douglas* case [10] and in *Strutt's* case [11] more particularly he challenges it on historical grounds, maintaining that the common law in its original setting knew no such principle, but rather that it was settled law that a third party could in certain circumstances enforce a promise made for his benefit by way of Assumpsit.[12] Attention has been drawn elsewhere [13] to authorities which are contrary to this thesis. In *Strutt's* case the learned judge assails *Tweddle* v. *Atkinson* with a potentially stronger weapon, namely, a modern statute. He prefaces the attack with a reference to the old technical rule of common law that even a named beneficiary could not sue on an indenture made between specified parties unless he was named as a party, and to the abrogation of this rule by section 5 of the Real Property Act, 1845. Then he contends:

> "... the rule in *Tweddle* v. *Atkinson* was itself greatly modified by section 56 of the Law of Property Act, 1925.[14] Just as the 1845 Act modified the old technical rule about indentures, so the 1925 Act modified the new rule about contracts generally. Section 56 applies not merely to indentures, but to any instrument of agreement: and it applies not only to land but to any property, real or personal. It says that 'A person may take ... the benefit of any ... covenant ... respecting land or other property although he may not be named as a party ... to the instrument.' I can think of no words more apt to do away with the rule in *Tweddle* v. *Atkinson*, leaving the courts free, in cases respecting property, to go back to the old common law, whereby a third party can sue on a contract made for his benefit, ..." [15]

The crucial question is whether the legislature in 1925, when remoulding and clarifying the law of real property, intended to effect such a radical change in the substantive law of contract, affecting the range of privity of contract and the doctrine of consideration. Viscount Simon L.C. said not long ago [16]:

[10] *Supra*, at p. 514.
[11] *Supra*, at pp. 272–273.
[12] Relying on *Dutton* v. *Poole* (1678) 2 Lev. 210; *Martyn* v. *Hind* (1776) 2 Cowp. 437, at p. 443; *Marchington* v. *Vernon* (1787) 1 Bos. & Pul. 101n.; *Carnegie* v. *Waugh* (1823) 2 Dowl. & Ry. 277.
[13] (1954) 70 L.Q.R. 467; see the cases cited *supra*, note 9: see also Pollock on *Contracts*, 13th ed., pp. 168–169; Williston on *Contracts*, § 360; Corbin (1930) 46 L.Q.R. 12, at pp. 17–18.
[14] s. 56 (1) is set out in full in note 13 on p. 379, *supra*.
[15] See 20 *Conveyancer* (1956) at pp. 43 and 114.
[16] In *Nokes* v. *Doncaster Collieries* [1940] A.C. 1014, at p. 1022.

> " where, in construing general words the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction."

It was in this spirit that a narrower construction of this very section was adopted in *Re Foster* [17] by Crossman J., who said [18]:

> " [counsel's] contention really amounts to saying that an agreement by A with B to pay money to C gives C a right to sue on the contract. . . . I am not prepared to hold that section 56 has created such an enormous change in the law of contract."

In that case it was held that a contract of insurance containing a term that the insurance moneys were to be paid to a class of third persons, was not enforceable by one member of that class.[19] The Law Revision Committee in 1937 considered the meaning of this section and reported that it must be considered as " exceedingly doubtful " whether the words " conveyance or other instruments " would cover a commercial contract.[20] Accordingly, it is submitted that *Tweddle* v. *Atkinson* remains an authority in our law, though for the proposition which was its original *ratio decidendi*.

Thus, the leading cases, *Dunlop* v. *Selfridge* and *Tweddle* v. *Atkinson*, are not absolutely inimical to the theory that a contract made by two parties for the benefit of a third person creates an enforceable right for that third person: but they do preclude the third person from enforcing the promise in his favour unless he has provided consideration.

So far only the general doctrine advanced by Denning L.J. and Devlin J. has been tested against the authorities. Now the numerous examples given by the two judges should be put to the same test.

Examples Nos. 1–5 are amply supported by authorities [1] and may be regarded as sound statements of the positive law of England today. What is doubtful is whether any advantage is gained by regarding them as instances of a *jus quaesitum tertio* by way of contract. The concepts of privity of estate and assignment provide adequate explanations of the first two examples and *Nos. 3–4* rest clearly and simply on statutes. With regard to *Example No. 5*, the case of the undisclosed principal, the doctrine under review is

17 [1938] 3 All E.R. 357.

18 *Ibid.*, at p. 365.

19 See also *Re Sinclair's Life Policy* [1938] Ch. 799; *Re Miller's Agreement* [1947] Ch. 615.

20 Cmd. 5449, para. 41 (*e*). Winfield, in Pollock on *Contract*, 13th ed., at p. 171, note 53, says: " This subsection has not the sweeping effect that might be inferred from its wording." Either Dr. Cheshire or Mr. Fifoot is not convinced by the argument of Denning L.J.: see Cheshire and Fifoot on *Contract*, 4th ed., pp. 374–375 and preface.

1 See *ante*, pp. 375–376, notes 11–16.

hardly an adequate theoretical basis, since it affords no explanation of the pendant rule that an undisclosed principal is bound by contractual duties.

Three of the examples given, *Nos. 6–8*, are extremely dubious propositions of English law. The opinion that a widow could sue her husband's employers for a pension promised to her under his contract—*Example No. 6*—is hardly tenable in the face of *Tweddle* v. *Atkinson* and latterly *Re Schebsman*.[2] Even more vulnerable on the score of authority is *Example No. 7*, that a man's servants, etc., could sue on an insurance policy taken out by the master. The only case cited in support[3] lays down no such rule, and the leading work on the subject[4] rejects the general notion of third party rights in such contracts. In the same category must be listed the sweeping interpretation of section 56 (1) of the Law of Property Act, 1925—*Example No. 8*—which has already been discussed.

However, *Examples Nos. 9–14* deserve more serious attention. Each of them is supported by authoritative precedents[5] (though with modifications which it would be tedious to recite in this paper). But in all the relevant decisions it is remarkable that some principle of law other than a naked *jus quaesitum tertio* has been relied on by the judges concerned in reaching decisions in favour of third party beneficiaries. In some instances the courts have been at pains to infer a collateral contract between the beneficiary and the promisor.[6] In others the court has been astute to discover an agency in which the beneficiary might be the principal and the promisee his agent.[7] In the well-known line of cases from *Tomlinson* v. *Gill* to *Walford's* case, which support *Example No. 13*, courts with equitable jurisdiction have invoked the trust principle to justify a conclusion in favour of a third person beneficiary under a contract. To a modern reader it is evident that in all these lines of cases the collateral contract, the agency or the trust are but devices resorted to by the judges to achieve manifestly desirable results in the concrete situations confronting them: in a word they are legal fictions. This is most patent in the cases of constructive trusts, as several acute commentators have pointed out.[8] It is submitted that definite advantages would be gained by treating these lines of cases as establishing instances of a doctrine

[2] [1944] Ch. 83.
[3] *Prudential Staff Union* v. *Hall* [1947] K.B. 685.
[4] MacGillivray on *Insurance Law*, 4th ed. (1953), §§ 1046, 1736, 526–532.
[5] See *ante*, pp. 376–377, notes 20–21, and notes 1–4.
[6] *e.g.*, in *Urquhart Lindsay & Co., Ltd.* v. *Eastern Bank, Ltd.* [1922] 1 K.B. 318, a case which supports *Example No. 9*, and in the *Elder Dempster* case [1926] A.C. 522, *per* Lords Finlay, Sumner and Dunedin, a case which supports *Example No. 11*.
[7] *e.g.*, in *Hall* v. *N.E.Ry.* (1875) 10 Q.B. 437. *Cf. Cosgrove* v. *Horsfall* (1945) 62 T.L.R. 140 and *Adler* v. *Dickson, supra, per* Jenkins and Morris L.JJ.
[8] Corbin in (1930) 46 L.Q.R. 12, *passim*; Lord Wright in (1939) 55 L.Q.R. 208. The Law Revision Committee itself reported that the trust concept was "an unnecessary complication": Sixth Interim Report, para. 46.

of *jus quaesitum tertio* by way of contract. The doctrine rationalises the cases by going behind the fictions and expressing what was evidently the principle which actuated the judges in the particular decisions. It would cut the Gordian knot of case-law on constructive trusts which is notorious,[9] and thereby save time in courts and cut down costs for litigants. It would enable the courts to escape one highly inconvenient implication of the trust concept, namely, that the original parties lose the power to vary or abrogate the promise in the third party's favour, and to escape the awkward implication of the fictitious contract or agency—that if the beneficiary is a principal to a contract he is bound by contractual duties. Moreover, some eighty years after the Judicature Act, there is much to commend a restatement of the law which transcends the distinction between equitable and common law doctrines. More judicial valour, to use Pollock's phrase, on the part of more judges in appellate courts could establish this particular restatement.

The proposition that when a covenant is made under seal expressly for the benefit of a third person who is not a party to the deed he acquires a right to enforce the covenant, *Example No. 14*, is fully supported by authorities, ancient and modern.[10] It constitutes the single unquestionable example of a *jus quaesitum tertio* by way of contract in English law today. It is not encumbered by the rule that consideration must move from the beneficiary as there was no such procedural requirement in the law of the old actions of Covenant and Debt sur Obligation.

It remains to recapitulate that *Example No. 15* is the general principle, and *Example No. 16* the particular ruling of the decision of Devlin J. in *Pyrene* v. *Scindia*, *supra*. The only difficulty about accepting these examples is to find consideration moving from the third person beneficiary—the owner of property—to the promisor. On the particular facts of *Pyrene* v. *Scindia* sufficient consideration may perhaps be found in the fact that the owner permitted the shipowner to lift the goods on board.[11]

* * *

The term *jus quaesitum tertio* if not the doctrine has been received into English law from the law of Scotland. It should be profitable to pause and consider the scope of the doctrine in its native system. Stair, in the seventeenth century, expressed the principle thus [12]:

> "... when parties contract, if there be any article in favour of a third party, *est jus quaesitum tertio*, which cannot be

[9] See Law Revision Committee's observations, *op. cit.*, paras. 42–46; Cheshire and Fifoot on *Contract*, 4th ed., pp. 369–373; Dowrick, *Notes on the Irish Law of Contract* (1954), pp. 19–20.

[10] See *ante*, p. 377, note 4.

[11] *Cf. Scotson* v. *Pegg* (1861) 6 H. & N. 295

[12] Institutions, I, x, 5.

> recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform."

At the end of the nineteenth century it was restated in the Court of Session [13]:

> "That is an express stipulation in favour of a third party . . . and it is in effect an agreement between the two parties to the contract that a stipulation shall be performed with that party, and the rule in such a case is, that though the person in whose favour the stipulation is made is not a party to the agreement, or at the time assenting to it, he may afterwards adopt the agreement in his favour and sue upon it."

To entitle a third person, T, to enforce such an agreement, several conditions must all be satisfied. (1) T must be named or at least referred to in the contract.[14] (2) When making the contract the contracting parties must have intended to confer a legal right on T[15]; it is not enough that T would incidentally benefit as a result of an advantage which one party proposed to secure to himself.[16] (3) T must be able to show a legitimate interest in the remedy he seeks. Gloag[17] specifies as "interests"—damage, pecuniary loss or liability incurred by the third person as a result of the non-performance of the promise. (It will be recalled that Denning L.J. emphasises that T must have a "sufficient interest" to enforce a promise in his favour, denoting thereby a close connection with the original agreement rather than an injury sustained by the non-performance of the promise. The Law Revision Committee's proposals contain no such limitation.) An important question is whether the original parties have the power to revoke the promise. Stair's opinion, cited above, implies that they never enjoy such a power. But this rigid view has been rejected in a modern case.[18] Revocation is probably possible before T is aware of the promise.[19] When T has become aware of the promise and has acted in reliance on it, then, at any rate, the original parties cannot revoke it.[20] It is pertinent to observe that the major technical obstacle to a general doctrine of *jus quaesitum tertio* in English law, that consideration must move from the plaintiff, does not impede a *tertius* in Scots law [1]:

> "It is a familiar doctrine in the law of Scotland, differing in that respect from the law of England, that an obligation is binding . . . although it may not proceed on a valuable consideration . . . or . . . under seal. What is necessary is that

[13] *Morton's Trustees* v. *Aged Christian Friend Society*, 1899, 2 F. 82, at p. 87, *per* Lord Kinnear.
[14] Gloag, *The Law of Contract*, 2nd ed., p. 236.
[15] *Ibid.*, pp. 235–239.
[16] *Henderson* v. *Stubbs, Ltd.*, 1894, 22 R. 51.
[17] Gloag, *op. cit.*, pp. 250–256.
[18] *Carmichael* v. *Carmichael's Exrx.*, 1920, S.C. (H.L.) 195, at pp. 199–203, *per* Lord Dunedin.
[19] *Ibid.*, at p. 201.
[20] *Dalrymple* v. *Herdman*, 1878, 5 R. 846.
[1] *Cf.* Lawson, *Rational Strength of English Law*, p. 44.

the promisor should intend to bind himself by an enforceable obligation, and should express that intention in clear words." [2]

Next, to glance at the American law on the subject. The term "American law" of course covers a multitude of systems of law, which are not by any means uniform on this point. At one extreme some states [3] have a general statutory provision in these terms: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." (*Cf.* the terms of English Law Revision Committee's general proposal.) At the other extreme, in some states the law denies to third person beneficiaries the right to sue on contracts,[4] except in narrowly defined instances, mostly statutory. But Williston asserts [5] that "The great weight of American authority recognises a direct enforceable right, both at law and in equity, arising from a contract promising performance for . . . two types of beneficiaries—the donee beneficiary [6] and the creditor beneficiary." [7] The American *Restatement of the Law of Contracts* adopts this general principle.[8] A third type of beneficiary, an incidental beneficiary, *i.e.*, a beneficiary who does not fall within the above two categories, acquires no such right.[9] Williston sums up the case-law stretching back barely 100 years,[10] in which this doctrine has been built up: "The pressing necessity of the situation . . . has led the great majority of the American courts frankly to recognise . . . that through this travail [resort to the trust principle and the fiction of identity of promisee and beneficiary, invocation of agency, novation and even subrogation] the common law has given birth to a distinct, new principle which . . . gives not only to a donee beneficiary, but also to a creditor beneficiary, the right to enforce directly the promise from which he derives his interest." [11] The old technical rule of common law that consideration must move from the plaintiff has evidently been abandoned.[12]

While English judges and jurists have called attention to the fact that English law is almost alone among modern systems in

[2] *Morton's Trustees* v. *Aged Christian Friend Society*, 1899, 2 F. 82, at p. 85, *per* Lord Kinnear.

[3] *e.g.*, California; see Williston on *Contracts*, § 365.

[4] *e.g.*, Massachusetts; see Williston, *op. cit.*, § 367.

[5] Williston, *op. cit.*, § 356.

[6] Under a contract between A and B in which A promises to B to do something for T's benefit and B's purpose in obtaining the promise is in effect to make a gift to T, then T is a *donee beneficiary*. The typical case is a life insurance policy in which the insurance moneys are payable to a third person, say a relative of the insured.

[7] T is a *creditor beneficiary* under a contract between A and B if performance of a promise by A will satisfy a duty owed by B to T. The typical example is where B grants to A mortgaged premises and A contracts with B to pay the mortgage debt to the mortgagee, T.

[8] §§ 133–136.

[9] Williston, *op. cit.*, §§ 356 and 402; *Restatement*, §§ 133 (1) and 147.

[10] Since *Lawrence* v. *Fox* (1859) 20 N.Y. 268.

[11] Williston, *op. cit.*, § 357.

[12] *Restatement*, § 75 (2), comment e; Pound (1951) 67 L.Q.R. 49, at p. 61; Williston, *op. cit.*, § 354.

denying a doctrine of *jus quaesitum tertio* by way of contract,[12a] none of them has been able to demonstrate that family arrangements or business dealings or other social patterns in modern England differ from those in Scotland or in most American states to such an extent as to justify the absence of such doctrine in our law.

* * *

It remains to consider whether a *jus quaesitum tertio* by way of contract in English law is justifiable on principle even if it is difficult to accept it on the authorities.

Using the term principle in its widest sense, is a *jus quaesitum tertio* in accordance with the fundamental theory of contract law? The sceptical common lawyer will immediately ask—which theory? It is only proposed to consider two theories which are at least congenial to the modern English common law. Pound's theory is that the common law of contract is based upon the postulate that men must be able to assume that those with whom they deal will act in good faith, and hence, that the latter will make good reasonable expectations created by their promises or other conduct.[13] Pollock's first principle of contract is substantially similar.[14] If A promises under a contract with B to benefit T, would it be in accord with or opposed to this theory to grant T a right to the performance of the promise by A? Clearly, if T knows of the promise and as a reasonable man would expect performance, the law should grant him a legal right to that end. An alternative theory which has wide currency amongst English lawyers,[15] is that the law of contracts has as its objective the enforcement of promises provided they are parts of bargains: all agreements are not to be enforced, only agreements consisting essentially of a promise on one side in return for consideration on the other. Should T be granted legal remedies to enforce a promise made by A to B in which B has provided the consideration? The bargain exists. The only question is should T be given a right to enforce it as well as B? If the object of the law is to *enforce* bargains the additional means of enforcement are justified, especially in cases where B's undoubted right of action would only entitle him to nominal damages,[16] or where B refused to sue. While either

[12a] *Cf.* French law which sanctions a *jus quaesitum tertio* by way of contract: see Planiol, *Traité Élémentaire de droit Civil, II*, § 1234; Lawson, *A Common Lawyer Looks at the Civil Law*, p. 56.

[13] *Introduction to the Philosophy of Law*, Revised ed. (1954), at p. 105.

[14] "The Law of Contract may be described as the endeavour of public authority . . . to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness": *Principles of Contract*, 13th ed., p. 1. *Cf.* Salmond, *Jurisprudence*, 10th ed., p. 352.

[15] See Cheshire and Fifoot on *Contract*, 4th ed., *passim*.

[16] *West* v. *Houghton* (1879) 4 C.P.D. 197; Glanville Williams, "Contracts for the Benefit of Third Parties" (1944) 7 M.L.R. 123, at pp. 124 and 137; American *Restatement of the Law of Contracts*, § 135, comment b.

theoretical approach to the problem yields a result favouring a doctrine of *jus quaesitum tertio* it must readily be admitted that such a deductive approach rarely convinces English lawyers.

When our judges resolve a problem "on principle" rather than on authority their method is often not so much deduction from first principles as a close examination of the practical aspects of the claims before the court. Approaching the problem in this spirit, the gravamen of the case against Viscount Haldane's denial of a *jus quaesitum tertio* in contract in our law is that numerous classes of third person beneficiaries do suffer injury when the promisor under a contract for their benefit fails to perform. In business a series of onerous undertakings may be made by the beneficiary on the strength of the promise: in family affairs various major irretraceable steps may be taken by the expectant beneficiary. Admittedly, the urgent claims of some limited classes of such beneficiaries have already received legal recognition by the courts and by Parliament. The courts have appreciated the needs of some beneficiaries in concrete situations, and to meet them have either extended the principle of the trust to the extremes of legal fiction, or supposed an agency to have been created or have inferred a contract to which the beneficiary is an original party—as noticed earlier. Parliament has provided remedies for aggrieved beneficiaries such as spouses and children of insured persons under life insurance policies,[17] and for other classes of beneficiaries cited earlier (see *Examples 2, 3 and 4*). But the argument that Parliament would have extended such remedies to other classes of third person beneficiaries if their claims had been sufficiently urgent, ignores the political reality that in recent decades it is exceedingly difficult to find parliamentary time for reform of the private law. Men of affairs today, drawing on their own experience, would probably agree that most of the sixteen examples given earlier in this paper are instances of *de facto* claims in contemporary English society, some of major importance in commercial life, *e.g.*, sellers' claims on bankers' commercial credits, and some in family life, *e.g.*, widows' claims. The practical justification of a *jus quaesitum tertio* doctrine is stressed by Denning L.J. It is simply "to give damages to the party aggrieved." [18] Since the third person beneficiary will rarely have an action against the promisee, and since the promisee will often only be entitled to nominal damages from the promisor, a remedy in the beneficiary's hands is often the only way the law can compensate him for his loss.

But would a *jus quaesitum tertio* satisfy beneficiaries' interests at the expense of the interests of the promisors and the promisees? It would, of course, be robbing Peter to pay Paul if the beneficiary

[17] Married Women's Property Act, 1882, s. 11.

[18] *River Douglas* case, *supra*, at p. 516; the phrase is borrowed from Coke on Littleton, at p. 385, where it was used to justify the doctrine of the benefit of covenants running with land.

acquired an absolute right to the performance of the promise in his favour. Neither Denning L.J. nor Devlin J. advocates such an absolute right, nor is it granted under the predominant American doctrine.[19] T's claim can be met by the promisor with any defence which he would be entitled to raise against the promisee: in other words, T's right is subject to the same limitations as the promisee's right. Thus, the original promisor's interests are not subverted by satisfying the beneficiary's interests. Both the original parties have, however, an interest in revocation of the original contract by subsequent agreement. A compromise may be struck here between the interests of A and B on the one hand and that of T on the other by allowing A and B to revoke or vary the promise before T "adopts the contract" (Law Revision Committee), or "materially changes his position in reliance on it" (American law with respect to creditor-beneficiaries[20]) or before T is aware of it (Scots law).

It should not be supposed that the doctrine of third party rights would impose a contractual obligation on a promisor where none would otherwise attach to his promise. On the contrary, it should be emphasised that the doctrine would only come into operation in cases where there already existed a valid enforceable contractual obligation between A and B, when A intended or at least assented to some duty in favour of T. Granting T a right to enforce A's duty would only duplicate an existing right enjoyed by B. In cases where B refuses to sue or is only entitled to nominal damages, it would establish an effective as opposed to a mere technical right. It would, in Pound's terminology, but strengthen the social interest in the security of transactions.

Conclusion

The principal objection to the doctrine under examination is based not on practical or theoretical grounds but on the technical rule of the obsolete legal procedure, Assumpsit, which has been elevated by a series of cases culminating in the decision of the House of Lords in *Dunlop* v. *Selfridge*, into an authoritative rule of substantive law—that consideration must move from the plaintiff.[1] The comment of the Scots Lord of Appeal, Lord Dunedin, in *Dunlop* v. *Selfridge*, is pertinent[2]:

> "My Lords, I confess that this case is to my mind apt to nip any budding affections which one might have had for the doctrine of consideration. For the effect of that doctrine in the

[19] Williston, *op. cit.*, §§ 364A, 394–395; *Restatement*, § 140.
[20] Williston, *op. cit.*, § 397; *Restatement*, § 141.
[1] An interesting question is whether the genesis of the rule in adjectival law was not simply the general rule of Case, that the plaintiff must show that he has suffered special damage—the very justification for the *jus quaesitum tertio* doctrine stressed by Denning L.J. "to give damages to the party grieved."
[2] [1915] A.C. 847, at p. 855.

> present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce."

But notwithstanding that sentiment, Lord Dunedin and the other five judges applied the rule to defeat the third person beneficiary's claims. Judges disposed to adopt the *jus quaesitum tertio* doctrine might conceivably distinguish that case on such grounds as, for instance, that in that case it was assumed that the third person claimed *qua* undisclosed principal, or that its authority is limited to cases of manufacturers trying to enforce price maintenance agreements to the public disadvantage. The radical solution is, of course, parliamentary legislation abrogating the technical rule that consideration must move from the plaintiff.

The conclusion is that Lord Justice Denning's general doctrine of *jus quaesitum tertio* in contract is not yet an established part of our positive law. But his dicta emphasise a need existing in English society for such a legal doctrine, and they constitute proposals, consistent with theory and justifiable on practical grounds, for judicial legislation in concrete situations—a process begun by Devlin J. in *Pyrene* v. *Scindia*—or for comprehensive parliamentary legislation. As such they constitute a valuable supplement to and reminder of the Law Revision Committee's pre-war proposals.[3]

F. E. DOWRICK.*

[3] Dr. Cheshire and Mr. Fifoot have recently re-emphasised the importance of their proposals: *Law of Contract*, 4th ed. (1956), p. 376.

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GIFT *INTER VIVOS* OF A CHOSE IN POSSESSION BY DELIVERY OF A KEY

No gift *inter vivos* of a chose in possession can be effective, in the absence of a deed of gift, without delivery.[1] It is not proposed in this article to attempt even the briefest analysis of possession or to examine the complexities to which the term "delivery" can give rise. It is sufficient here to summarise "delivery" in English law as a whole as denoting *either* that one party puts the other in physical control of the goods or provides him with the means of getting at the goods, *or* that the physical control of the goods is unchanged but the character or purpose of such control is changed by agreement (so that legal possession continues to remain in the other party or passes to him, as the case may be).[2] Any of these modes, other than actual physical transfer of the subject-matter, is sometimes termed "constructive delivery" on the ground that the law will in such circumstances construe what is plainly not a manual transference as equivalent to one, so far as legal effect is concerned.

In the law of gift the simplest illustration of delivery where the donor puts the donee in physical control of the subject-matter is, of course, where the donor manually transfers the chattel to the donee, by handing it over to him. If I hand you, the donee, a pen (the subject-matter of the gift), then by my act possession leaves me and becomes vested in you—you become thereby owner of the pen. But the case we are to consider is the far more difficult one where the donor does not transfer the subject-matter itself, but hands over the physical means of getting at the subject-matter, namely a key of, *e.g.*, a warehouse or of a box, where the contents are kept. If I now wish to give you the wine stored in my cellar, does my handing you the cellar-key complete the gift?

It must be stated at once that there is no decided case on such a point relating to gift *inter vivos*,[3] and our only practical approach

[1] *Irons* v. *Smallpiece* (1819) 2 B. & A. 551; *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57; Holdsworth, *History of English Law*, 3rd ed., Vol. III, pp. 354–360, and Vol. VII, pp. 503–509.

[2] Under the latter heading in gift would be considered the position where the donor retains the goods as bailee for the donee; where the donee as bailee is already in possession; where the subject-matter of the gift is in the hands of a third party bailee; and where the donor and donee are living together in the same house, the goods remaining *in situ*. But these topics are excluded from the scope of the present inquiry.

[3] A *nisi prius* case, *Smith* v. *Smith* (1733) 2 Strange 955, at first sight seems to illustrate a gift *inter vivos*, where the question turned on whether an intestate's habitual deposit with the defendant of the key of his room, whenever he went out of town, amounted to delivery of some furniture and plate. The report is

is to examine cases touching other branches of law in the hope of arriving at some helpful conclusion. The deduction will necessarily be based on analogy, and what is sufficient for the passing of legal possession in one branch of law is not inevitably adequate in other branches, so that the solution of our problem will, at best, be a tentative one.

In *Ward* v. *Turner*[4] one of the questions was whether the delivery of certain receipts could operate as a transfer of some South Sea annuities so as to effectuate a *donatio mortis causa*. In the course of the judgment Lord Hardwicke said[5]: "It is argued, that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of any thing by way of symbol is sufficient: but I cannot agree to that . . . ," and later[6] "Delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing: and therefore the key is not a symbol, which would not do."

In effect, Lord Hardwicke makes two distinct points: first, that the transfer of any symbol (such as, *e.g.*, a sample of fabric representing a Persian carpet or a photograph as a substitute for an original painting) is valueless as a legal transfer of the items represented; second, that delivery of a key is adequate to operate as a change of possession, since it is the means of getting at the subject-matter and is in no sense a symbol.

This distinction between something handed over as a representation of the subject-matter ("symbolic delivery") and something handed as a means of access to it (an example of "constructive delivery") is a fundamental one of vital importance. Only the latter situation, according to Lord Hardwicke's analysis, produces the desired legal result. This is to assert not that a key is in its inherent nature incapable of being a symbol—we might indeed point, by way of analogy, to the frequent practice, when an eminent person is "given" the freedom of a city, of presenting him with a symbolic key—but that where possession of a chattel is intended to be transferred, the handing of a key to the place where it is stored can effect such transfer only because, far from being a symbol, it provides the actual means of access to that chattel.

There is no doubt that the law endorses Lord Hardwicke's attitude in not tolerating symbolic delivery. If, wishing to make you a present of a John portrait, I hand you a miniature post-card

only eleven lines in length, but the second sentence unaccountably contains a reference to "donatio causa mortis." One is left with the impression that there must be further facts, unreported, which bring the matter within the scope of a gift *mortis causa*.

[4] (1752) 2 Ves.Sen. 431; 1 Dick. 170.

[5] (1752) 2 Ves.Sen. at p. 442.

[6] At p. 443.

reproduction, I am handing you a symbol, *i.e.*, a chattel to serve in the place of the real subject-matter and no ownership passes.[7]

It remains, then, to consider the legal support given to Lord Hardwicke's second point—the handing of a key as a means of access. We must note at once that some judgments contain an unhappy confusion in terminology. These cause initial dismay by erroneously describing this second category of case, where the key is transferred, as "symbolic delivery." Fortunately, the context often reveals that the judges are here thinking of the delivery as symbolic in the sense that no actual physical transfer has taken place but the law deems that it has. In other words, they inaccurately speak of "symbolic delivery" as though it were a synonym for "constructive delivery," for in "symbolic delivery," properly called, something not the subject-matter is handed over, whereas in "constructive delivery" there is no substitution of one chattel for another, it is merely that the chattel itself, the subject-matter, is construed in law as having been actually handed over by manual transfer.

Sir Frederick Pollock, in particular, shows how the courts when using the term "symbolic delivery," are in many cases guilty of no more than a linguistic error. For example, he emphasises that though dicta in *Ellis* v. *Hunt*,[8] *Chaplin* v. *Roberts*,[9] and *Elmore* v. *Stone*[10] (three cases relating to sale), have occasionally been quoted to demonstrate the existence of "symbolic delivery," such *dicta* in no way conflict with "the intelligible position taken up by Lord Hardwicke."[11] And of *Ancona* v. *Rogers*[12] (unregistered bill of sale, liquidation petition) and *Meyerstein* v. *Barber*[13] (pledge, bill of lading), where Mellish L.J. and Willes J. respectively, speak of delivery of a warehouse key and the like as "symbolic delivery," Pollock says[14] "there is no real contradiction between this and what Lord Hardwicke said, 'the key is not a symbol, which would

[7] Rare exceptions may exist, *e.g.* (1) indorsement and delivery of a bill of lading while the goods are still *in transitu*. See Williams, *Principles of the Law of Personal Property*, 18th ed., p. 78; *Barber* v. *Meyerstein* (1870) L.R. 4 H.L. 317; *Dublin City Distillery, Ltd.* v. *Doherty* [1914] A.C. 823; *Morison* v. *Gray* (1824) 2 Bing. 260. (For the references to Williams and to the first two cases I am indebted to a lecture syllabus prepared by H. A. Hollond, Esq., M.A., LL.M., Emeritus Rouse Ball Professor of English Law, University of Cambridge.) It can be argued, however, that the bill of lading is not a symbol in the proper meaning of the term but is the instrument whereby the deliveree can gain access to the goods, since by producing the bill of lading indorsed to him he is able to claim possession of the goods. See Scrutton on *Charterparties*, 15th ed. by McNair and Mocatta, p. 185, pp. 328–329. (2) The situation regarding heavy goods envisaged in *Lock* v. *Heath* (1892) 8 T.L.R. 295, where the donor and donee live together in the same house. See also *Kemp* v. *Falk* (1882) 7 App.Cas. 573, at p. 586, and *Re Harcourt* (1883) 31 W.R. 578.

[8] (1789) 3 T.R. 464.

[9] (1800) 1 East 192.

[10] (1809) 1 Taunt. 458.

[11] Pollock & Wright, *Possession in the Common Law*, pp. 63–64.

[12] (1876) 1 Ex.Div. 285.

[13] (1866) L.R. 2 C.P. at p. 52.

[14] Pollock & Wright, *Possession in the Common Law*, p. 68.

not do.' The key is not a symbol in the sense of representing the goods, but the delivery of the key gives the transferee a power over the goods which he had not before. . . ."

The distinction was well appreciated by the court in *Gough* v. *Everard*,[15] where the point at issue was whether some timber was in the "possession or apparent possession" of a vendor who became bankrupt, so as to be governed by the Bills of Sale Act, 1854. The timber, sold by one Ernest to Gough, was kept on Ernest's wharf. Gough, who had formerly had custody of the key to the wharf as Ernest's agent now retained it on his own behalf. Ernest having become bankrupt, counsel argued that the timber had never left Ernest's possession or apparent possession. "The key," said counsel, "was a mere symbol of possession." Pollock C.B. instantly interrupted: "The whole of the timber lying at the private wharf was sold to the plaintiff, and the key gave him the actual possession of it." And in his judgment he remarked: "The key of the wharf had been delivered to him, and he had manual control over the timber."[16] Bramwell B. said: "The plaintiff had taken possession as much as he could do so."[17] Again, Mr. Justice Kekewich in *Hilton* v. *Tucker*[18] (pledge of goods) considered that "the delivery of the key in order to make constructive possession must be under such circumstances that it really does pass the full control of the place to which admission is to be gained by means of the key; as, for instance, where timber is deposited in a warehouse."

There are useful cases relating to *donatio mortis causa* in which the handing over of a key has been regarded as a sufficient transfer of possession. In *Mustapha* v. *Wedlake*,[19] for instance, the donor deposited some bonds in a safe, the key of which was kept in a wardrobe. The key of the wardrobe was kept on his bunch of keys and when he was very ill he sent for the plaintiff and said to her: "Lulu, dear, take my purse and keys." The plaintiff did so, and the donor then declared in five staccato phrases: "That is right; put them in your pocket; take the bonds; all is yours. Take care of your brother and sister." He died shortly afterwards.[20] Mathew J. could see no reason to distinguish the case from *Jones* v. *Selby*[1] (decided in 1710, where the key of a trunk, containing some rings and a government tally, had been delivered), and upheld a *donatio mortis causa* in the plaintiff's favour.[2]

15 (1863) 2 H. & C. 1.
16 pp. 7–8.
17 p. 11.
18 (1888) 39 Ch.D. 669, at p. 676.
19 (1891) 8 T.L.R. 160.
20 Before his death he had just time to gasp out a somewhat depressing command: "Don't give me any more brandy; let me die in peace."
1 (1710) Prec.Ch. 300.
2 In *Ward* v. *Turner* (1752) 2 Ves.Sen. 431; 1 Dick. 170, Lord Hardwicke observed of *Jones* v. *Selby* that possession had passed, "for" (in his words in the Dickens report at p. 172) "the donor was restrained from making use of

Re Wasserberg[3] is interesting, because, although it is concerned with a gift *mortis causa*, references are made therein to gift *inter vivos*. W. kept some bearer bonds in the custody of his bank. Being about to undergo a serious operation, he wished the bonds to belong to his wife in the event of his death. He placed them in a parcel, wrote his wife's name on the outside and put it in his locked box. His wife was present at the time. He left the locked box with the bank, but retained the key, which he later in the day handed to his wife, together with a list of the bonds, telling her to lock them both up—which she did in a private drawer of her own room, of which she had and always kept the key. W. died shortly afterwards.

Sargant J. was sure that there had been no delivery of the bonds to satisfy a gift *inter vivos*. If W. "had actually given the parcel to his wife and she had handed it back to him for the purpose of safe custody, that would probably have been enough," but this had not occurred. Nor was the subsequent transfer of the key sufficient, one reason being that "*the delivery of the key did not in itself enable the recipient to get at the bonds*," since the bank would not have allowed Mrs. W. to have access to the box without some further authority from W.[4]

A gift *inter vivos* would have failed, then, because the key did not provide the means for putting the bonds under the donee's effective control.[5]

Two more cases, not concerned with *donatio mortis causa* but of comparatively recent origin, are helpful. In *Wrightson* v. *McArthur and Hutchisons (1919) Ltd.*[6] it was held that possession of certain goods passed to the plaintiff by the delivery of the keys of the rooms in which they were locked up, even though these rooms were on the defendant's premises. Rowlatt J. made a valuable endorsement of "the principle that delivery of a key has effect not as symbolic delivery but as giving the actual control."[7] In

[the articles], without the consent of the donee, and the donor could not rightfully come at them, without the key." I am indebted to D. W. Logan, Esq., D.C.L., D.PHIL., for this observation in Dickens, contained in his unpublished thesis on *donatio mortis causa*. *Cf. Re Taylor* (1887) 56 L.J.Ch. 597. Contrast *Reddel* v. *Dobree* (1839) 10 Sim. 244, where there was no *donatio mortis causa* of the contents of a locked cashbox delivered by the owner, for he reserved the key to the box.

3 [1915] 1 Ch. 195.

4 See pp. 202–203. My italics.

5 Sargant J. considered that a gift *inter vivos* here would also have failed on a further ground. See *infra*, at pp. 400–401. The case was finally decided in favour of a *donatio mortis causa*, on the ground that the transfer of a key gave Mrs. W. a partial dominion over, or part of the means of getting at, the bonds, there being a corresponding deprivation of W.'s power of dealing with them, and on the facts he intended to part with dominion over the locked box. The rules are thus laxer for gift *mortis causa*. (*Cf.* a very similar situation and decision upholding *d.m.c.* in *Re Lillingstone* [1952] 2 All E.R. 184.)

6 [1921] 2 K.B. 807.

7 At pp. 816–817.

the second case, *Thomas* v. *Metropolitan Housing Corporation*,[8] it was held on appeal that the surrender by Mrs. H., the outgoing tenant of a flat controlled under the Rent Acts, of the flat-key by depositing it in the letter-box of the landlords' agent's office, gave the landlords "actual possession" within the meaning of the Acts, so that when a new tenancy began, with T. as tenant, the premises had become decontrolled. Slesser L.J. expressed approval[9] of Chief Baron Pollock's answer to counsel in *Gough* v. *Everard*[10]; and Scott L.J. in a concurring judgment said: "Possession of the key gives actual possession."[11]

It was noted at the outset that a decided case on gift *inter vivos* is lacking,[12] but there seems general agreement in these other branches of law on the effect of delivering a key, and it would not appear unreasonable to suggest that by analogy the underlying principle can be applied to gift *inter vivos*. We might, then, suggest, with some degree of guarded confidence, that a rule may provisionally be formulated as follows:

Where the donor transfers to the donee possession of a key as the physical means whereby the donee can get at and control the subject-matter of the gift, such transfer operates as the transfer of possession of the subject-matter itself.

The suggested rule is stated provisionally, because two points remain for consideration:

(1) It will be recalled that in *Ward* v. *Turner*[13] Lord Hardwicke said[14]: "Delivery of the key of *bulky* goods, where wines, etc., are, has been allowed as delivery of the possession. . . ." And in *Chaplin* v. *Rogers*[15] (where the question was whether there was a sufficient acceptance to satisfy section 17 of the Statute of Frauds), Kenyon C.J. said: "Where goods are *ponderous, and incapable* as here *of being handed over from one to another*, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged. . . ."[16]

[8] [1936] 1 All E.R. 210, cited in Dr. D. W. Logan's unpublished thesis on *donatio mortis causa*.

[9] At p. 214.

[10] (1863) 2 H. & C. 1, at pp. 7–8. On *Gough* v. *Everard* see *supra*, at p. 397.

[11] The excellence of this judgment is unfortunately marred by a reference to the surrender of the key as "a symbolic giving-up of possession" and to the landlords' receiving possession "symbolically when the key was put in their letter-box." See p. 216.

[12] See *supra*, at p. 394. *Rawlinson* v. *Mort* (1905) 93 L.T. 555 is, it is true, a case of gift *inter vivos* where the donee was in possession of a key, but no emphasis was placed on this fact in the judgment, and in any case the key there seems to have been regarded, incorrectly, as a "symbol."

[13] (1752) 2 Ves.Sen. 431; 1 Dick. 170.

[14] 2 Ves.Sen. at p. 443.

[15] (1800) 1 East 192.

[16] *Cf. Ryall* v. *Rowles* (1749–1750) 1 Ves.Sen. 348, where Burnet J. said, at p. 362, "So a delivery of the key of a warehouse is a delivery of those goods, which are *bulky* being the only immediate delivery the things are capable of." My italics in these three citations.

Must we, therefore, restrict the rule as to the transfer of a key to cases where the subject-matter is so bulky, ponderous or the like that it cannot be "handed over from one to another"? That is what these cases would suggest, and further support might be found, inferentially, in the recollection that the subject-matter was timber in *Gough* v. *Everard* and furniture (and plate) in *Smith* v. *Smith*; the illustration of goods or timber stored in a warehouse is given by Willes J. in *Meyerstein* v. *Barber* and by Kekewich J. in *Hilton* v. *Tucker*. Moreover, the Court of Appeal in reviewing cases on *donatio mortis causa* in *Birch* v. *Treasury Solicitor*[17] said[18]: "It is of the essence of a valid *donatio* that there should be *traditio*, *i.e.*, delivery in fact of the thing given to the donee. As Lord Hardwicke L.C. observed in *Ward* v. *Turner*, mere symbolic delivery will not suffice. It might, therefore, be supposed that there could be a valid *donatio* only of such subject-matters as were capable of actual manual delivery. This, however, is clearly not the law. Thus (as Lord Hardwicke L.C. himself noted) *where the thing given is of a bulky nature*, the handing to the donee of the key of the box or place where the thing is kept will be sufficient and it is not to be regarded as merely symbolic." But the case in question was concerned not with a key but with a deposit book, and the approval given to Lord Hardwicke's statement is thus *obiter*. But approval it certainly is. On the other hand, there is no overriding logical reason why there should be this limitation to bulky goods. And indeed, Lord Hardwicke, as we have already noted,[19] in the analysis of *Jones* v. *Selby* which he made in *Ward* v. *Turner* considered that the transfer of the key to the donee caused possession of the government tally in the trunk to pass, so that a good *donatio mortis causa* was constituted. Similarly, in *Mustapha* v. *Wedlake* there was a good *donatio mortis causa* of the bonds in the safe when the plaintiff took the keys. The very point was in fact taken up. Counsel urged that delivery of a key was confined to bulky goods, but Mathew J. did not accept this argument, and expressly said that he could see no reason to distinguish the present case from *Jones* v. *Selby*.[20]

Re Wasserberg is rich in the citation of earlier cases. Sargant J. referred to the "clear decision" in *Jones* v. *Selby* and noted Lord Hardwicke's approval of it in *Ward* v. *Turner*. The learned judge went on to support *Re Taylor*[1] and *Mustapha* v. *Wedlake*, and

[17] [1950] 2 All E.R. 1198. The combined judgment of the Court of Appeal was read by Evershed M.R.

[18] At p. 1205.

[19] See *supra* at p. 397, note 2.

[20] Again, in *Re Craven's Estate* [1937] Ch. 423, at pp. 427–428, Farwell J. gave an illustration of a key to a "box" containing "certain valuables." The hypothetical "certain valuables" were not described, but they would presumably not be bulky. So, too, in *Rawlinson* v. *Mort* (1905) 93 L.T. 555, at p. 556, Bray J. said *obiter*: "I think delivery of a box can be given by handing over the key."

[1] (1887) 56 L.J.Ch. 597.

added: "In opposition to these express decisions a number of cases were referred to [*i.e.*, by counsel], but I cannot find that any one of them really negatived the proposition that an inchoate or imperfect delivery of chattels might be sufficient for the present purpose,"[2] and he concluded that there was a good *donatio mortis causa* of the bonds to Mrs. Wasserberg.

There was, however, an important *obiter dictum* on the question of gift *inter vivos*. The learned judge said[3]: "Again, as regards the subsequent delivery of the key I cannot think that this was a sufficient delivery to pass the bonds by way of ordinary gift. It would seem that the delivery of a key might be sufficient if the subject-matter of the gift were bulky goods in a warehouse which could not actually be delivered; but here . . . the subject-matter of the gift [was] eminently portable property. . . ." If this accurately states the true principle of law then delivery of a key, though it might support a *donatio mortis causa*, would not be sufficient to effectuate a gift *inter vivos*, unless the subject-matter of the gift were bulky, non-portable goods. And while there was no express restriction in the dicta[4] of Rowlatt J. in the later case of *Wrightson* v. *McArthur and Hutchisons (1919) Ltd.*, the goods in question were in fact "bulky," comprising a quantity of sylko packed in thirty-two cases, some buttons and thread.

On balance, therefore, it would appear safer to restrict the operation of the rule in the case of a gift *inter vivos* to goods of a bulky, ponderous nature and the like. And that seems to be the view taken in Halsbury,[5] Goodeve,[6] and Pollock.[7]

(2) The second point for consideration is whether the retention by the donor of a duplicate key prevents the possession from passing. In other words, for the rule to operate, must the donee have the *exclusive* physical means of getting at and controlling the subject-matter of the gift?

First, consider *Hilton* v. *Tucker*,[8] a case concerned with pledge, by way of security, of Stephen Tucker's prints and engravings stored in a room in Oxford Mansions, Oxford Street, hired for this purpose by Stephen Tucker (who died subsequently, the defendant, Mildred Tucker, being his personal representative).

In December Stephen Tucker had written to the plaintiff: "Larking has the key, which I place entirely at your disposal."

[2] Sargant J. here discussed *Hawkins* v. *Blewitt* (1798) 2 Esp. 663; *Bunn* v. *Markham* (1816) 7 Taunt. 224; *Farquharson* v. *Cave* (1846) 2 Coll. 356; *Powell* v. *Hellicar* (1858) 26 Beav. 261; *Reddel* v. *Dobree* (1839) 10 Sim. 244; *The Treasury Solicitor* v. *Lewis* [1900] 2 Ch. 812; and *Re Johnson* (1905) 92 L.T. 357. See pp. 204–206 of *Re Wasserberg* [1915] 1 Ch. 195.

[3] At pp. 202–203.

[4] See *supra* at p. 398.

[5] *Laws of England*, Vol. XV, para. 1242.

[6] *Personal Property*, 9th ed., p. 42. *Cf.* Holdsworth, *History of English Law*, Vol. VII, p. 504.

[7] Pollock and Wright, *Possession in the Common Law*, pp. 60 *et seq.*

[8] (1888) 39 Ch.D. 669.

Larking [9] was a clerk employed by Tucker to catalogue his collection. In a letter in the following January Tucker authorised the plaintiff "to retain possession" of his collection deposited in the room, "the key of which room is at present in your possession or power." There was also, the report discloses,[10] a duplicate key, held by the housekeeper, providing access to the room for the purpose of cleaning it; this key (and also, it seems, Larking's key at the plaintiff's disposal) was hung up in some hall office or the like, from which it could be collected from time to time. Kekewich J. admitted that Tucker was in a position to gain access to the keys to the room, but he did not consider that this invalidated the possession vested in the plaintiff, "Mr. Tucker from the first to the last acknowledging [by his two letters] that whatever power he might have, it was a power subject to Mr. Hilton's paramount control." [11] In effect, then, access to one or more keys by the one party did not deprive the other of his control of the room; or, in other words, *exclusive* control was not vital to the passing of possession.

Dicta from later cases do, however, suggest that this view may be too wide. In *Dublin City Distillery, Ltd.* v. *Doherty* [12] one question was whether there was a valid pledge of whisky stored in a warehouse. There were two locks on the door; the key of one lock was kept by the company, and the key of the second lock was held by an excise officer of the Inland Revenue, so that neither could enter the warehouse without the other's assistance. Lord Atkinson said [13]: "I doubt whether, owing to the dual control over this whisky . . . it would not be necessary . . . that both keys should be delivered." [14]

Farwell J. in *Re Craven's Estate*, a case on *donatio mortis causa*, is certainly of the opinion that the delivery of a box and key by a donor who retained a duplicate key "would probably be held not to be sufficient parting with dominion," because he would still have the power to open the box.[15] In other words, the donee would not have acquired effective control.

There is, of course, no decided case on gift *inter vivos*, but this observation of Mr. Justice Farwell on *donatio mortis causa* would seem to express the most proximate judicial opinion we have, and is on that account, it is submitted, preferable to the decision in *Hilton* v. *Tucker* which, after all, did not relate to gift, either *inter vivos* or *mortis causa*, but to the pledge of goods. This would, moreover, seem correct on principle, for how can the donee

[9] Spelt thus on pp. 670–671, but as "Larkin" on pp. 672, 675.
[10] At p. 671.
[11] At p. 676.
[12] [1914] A.C. 823.
[13] At p. 843.
[14] I am indebted to Dr. D. W. Logan's unpublished thesis for this reference.
[15] [1937] Ch. 423, at p. 428. In *Reddel* v. *Dobree* (1839) 10 Sim. 244, given *supra* at p. 398, note 2, there was only one box-key, and the donor reserved it. *Held*, no *d.m.c.*

be said to have "control" of the subject-matter by the delivery to him of a key if the donor is able at a moment's notice to resume control himself by employing the duplicate key which he has retained? This is exactly what Farwell J. had in mind when he said of *donatio mortis causa*[16]: "It seems to me that there must be such a parting with the dominion over the chattels . . . as to prevent the subject-matter . . . being dealt with by the donor in the interval between the *donatio* and either the death or the return of the articles by the donee to the donor." Since the donor's death or the return of the articles is not contemplated in a gift *inter vivos*, it logically follows that there should be a complete parting with the dominion over the chattel, and that the key should give the donee full and exclusive control, otherwise there can be no gift. Certainly, so far transfer of possession generally in the field of English law is concerned, Goodeve maintains that exclusive control by the transferee is necessary and that there can be no exclusive control where the transferor retains another key.[17]

There remains a possibility which we have not hitherto discussed. So far it has been assumed that both parties have employed good faith in their dealings with each other,[18] and we have concluded that there is no gift unless the key provides the donee with full exclusive control of the subject-matter. But now we must consider one possible qualification.

Suppose that the party who has delivered the key secretly retains with deliberate dishonesty a second key so as to get at the goods himself if he should so choose, does that invalidate the effectiveness of the transferee's possession? Sir Frederick Pollock discusses this possibility in relation to pledge and sale[19]: he cites dicta of Willes J. in *Meyerstein* v. *Barber*[20] and Bowen L.J. in *Sanders* v. *Maclean*,[1] and concludes: "It seems by the decision as to bills of lading drawn in sets of three (and these were the subject of the judgments just cited), and by the judgment in *Ancona* v. *Rogers*,[2] that . . . the vendor [who secretly retains another key] would clearly be estopped from denying that he intended the possession to pass." Perhaps the same principle of estoppel would apply to a dishonest donor. This is, however, a very theoretical situation which in practice will not arise, since the type of person who contemplates secretly retaining a second key as a prelude to making a gift will find it more natural not to make the gift at all, being under no obligation to do so. There seems small value in pursuing the point further.

[16] At p. 428.
[17] See the title "Transfer of Possession," *Personal Property*, 9th ed., pp. 42–43.
[18] Kekewich J. expressly emphasised the presence of this factor in *Hilton* v. *Tucker*, at p. 676
[19] Pollock & Wright, *Possession in the Common Law*, pp. 67–68.
[20] (1866) L.R. 2 C.P. 38.
[1] (1883) 11 Q.B.D. 327, at p. 343.
[2] (1876) 1 Ex.Div. 285.

Conclusion

This inquiry into the effect of the delivery of a key may now be concluded by a tentative and cautious formulation of the suggested rule in the following terms:

Where the donor transfers to the donee possession of a key as the physical means whereby the donee exclusively can get at and control the subject-matter of the gift, such transfer operates as the transfer of possession of the subject-matter itself, provided that the latter comprises goods of a bulky, ponderous nature or the like.

If this conclusion be correct, it is not in all respects satisfying. While it is certainly very reasonable that the donee and only the donee should have possession of the key, it seems curious that the bulk or ponderability of the subject-matter should be a determining factor. When a key is transferred, the size, weight or extent of the chattels should surely in logic and common sense be immaterial. The one ground of encouragement rests on the fact that this limitation lacks certainty as a legal proposition, and we may therefore hope that a case on gift *inter vivos* itself directly on the point will emerge in the future, to enable the court to give a clear ruling and eliminate this anomaly.

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NOTES OF CASES

The Application of the Cy-Près Principle to Cases of Failure of Charitable Object

The recent decision of Danckwerts J. in *Re Hanbey's Will Trusts* [1] has raised a number of unfamiliar points on the application of the *cy-près* principle to charities where the named object has come to an end but a gift over has been provided for the event of the failure of the named object. The facts were that by a will, taking effect in 1786, a testator had bequeathed a sum of money to trustees to apply the income in perpetuity to certain charitable (educational) purposes, specified with great particularity, with a gift over to Christ's Hospital in the event of the trustees' failure to apply the income in the precise manner specified by the will. For some thirty-eight years the trustees had been unable to carry out the prescribed trusts and ultimately they sought the directions of the court. Danckwerts J., after considering the authorities quoted to him, held that he had power to direct a scheme regulating the trusts notwithstanding that such a scheme might effectively defeat the gift over. However, taking into account the long-standing breaches of trust and the difficulty of settling a suitable scheme, the judge refused, in the exercise of his discretion, to direct a scheme and held that the gift over should take effect.

There can be little doubt of the correctness of the ultimate conclusion to which the judge came, in holding that the gift over took effect; but the assertion of jurisdiction to direct a scheme at all in such circumstances, seems to be a new departure. In principle a *cy-près* scheme is only applicable in such a case where it is impossible to carry out the donor's directions [2]; if the donor's directions can be effected they should be effected, and the gift over is just as much part of the donor's directions as the first gift directed; if then the gift over is practicable it should be carried into effect.

Now it is well settled that upon the subsequent failure of a charitable object in which a gift has vested, the court has jurisdiction to direct a scheme for the future application of the fund [3]; though it may be that a general charitable intention must be shown before the jurisdiction can be invoked.[4] This was basically the line

[1] [1955] 3 All E.R. 874; [1956] 2 W.L.R. 23; [1956] Ch. 264.
[2] *Philpott* v. *St. George's Hospital* (1859) 27 Beav. 107; *Re Weir's Hospital* [1910] 2 Ch. 124.
[3] *Spiller* v. *Maude* (1881) 32 Ch.D. 158n.; *Pease* v. *Pattinson* (1886) 32 Ch.D. 154; *Re Slevin* [1891] 2 Ch. 236.
[4] *Re Welsh Hospital Fund* [1921] 1 Ch. 655; *Gibson* v. *South American Stores* [1950] Ch. 177; *Re North Devon Relief Fund Trusts* [1953] 2 All E.R. 1032; 1 W.L.R. 1260.

of authority upon which implicit reliance was placed in *Re Hanbey*; but in all these cases the gift had been absolutely vested in the trustees, so that on failure of the object, the fund was beneficially *bona vacantia*. In none was there the particular factor of difficulty —the gift over—which faced the judge in the present case.

Where there is a gift over from one charity to another, the event upon which the gift over takes effect need not be limited so as to occur within the perpetuity period.[5] Since there can be no question of invalidity under this head, it would seem that the only question which should face the judge in such a case is: "Has the named event taken place?" If so, it must follow that (unless the second beneficiary also fails) a scheme can only be applicable until the event takes place. This proposition receives some support from one of the cases quoted to Danckwerts J., *Re Upton Warren (Parish)*,[6] a case in which a scheme was directed to deal with the application of accumulated arrears of income, the first gift not having failed and the event giving rise to the operation of the defeasance clause not having yet taken place.

If, however, the above proposition be correct (as is submitted), it covers only a case of surplus and not a case of failure; the only sum which can be freed is the income pending the happening of the event, for the capital is still tied. In such a case there is no question but that a general charitable intention must be shown before a *cy-près* application can be directed.[7] If there is no general charitable intention there would be a resulting trust to the donor's next-of-kin pending the taking effect of the gift over; and if such a hiatus were possible difficult questions of perpetuity would arise.[8]

Could it be said then that there was a general charitable intention in the present case? On principle, it should be doubted, in view of (1) the precise particularity of the specified object[9]; and (2) the very existence of the gift over itself.[10] On the other hand the fact that the first gift was potentially a perpetual gift may be regarded as fortifying a general charitable intention.[11] However this may be, the existence of a general charitable intention is vital since without it there can be no jurisdiction to direct a scheme. No mention was made of charitable intention, whether particular or general, in *Re Hanbey's Will Trusts* (*supra*).

Moreover, the cases quoted to the court[12] hardly assist. They

[5] *Christ's Hospital* v. *Grainger* (1849) 1 Mac. & G. 460; *Re Tyler* [1891] 3 Ch. 252.

[6] (1833) 1 My. & K. 410.

[7] *Clephane* v. *Lord Provost of Edinburgh* (1867) L.R. 1 Sc. & Div. 417; *Re Campden Charities* (1881) 18 Ch.D. 310.

[8] *Re Johnson's Trusts* (1866) L.R. 2 Eq. 716; *Worthing Corporation* v. *Heather* [1906] 2 Ch. 532. *Cf. Re Thetford School* (1609) 8 Co.Rep. 130b.

[9] *Russell* v. *Kellett* (1855) 3 Sm. & Giff. 264.

[10] *Re Talbot* [1933] Ch. 895, *per* Maugham J. at p. 902.

[11] *Cf.* the judgment of Sargant L.J. in *Re Monk* [1927] 2 Ch. 197 at p. 211.

[12] From Halsbury's *Laws of England*, 3rd ed., vol. 4, p. 299.

were three in number. *Re Upton Warren* (*supra*) is of course an early case, before the application of the general charitable intention was held to be necessary in surplus cases; but subject to this, it illustrates that the purpose of a scheme in such a case as the present is simply to cover the interim until the gift over takes effect. It does not deal with the case as one of failure of object leaving the property vacant, so to speak, the case in which alone the question of a scheme defeating a gift over could be relevant.

The other two cases are (it is submitted) of doubtful authority. *Re Richardson's Will* [13] was a case of a gift to the Royal National Lifeboat Institution upon trust to place a tubular lifeboat at Deal subject to a gift over in the event of a failure to carry out the testator's wishes. No such lifeboat was thought needful at Deal, but one was required at New Brighton. It was held that the court could direct the purchase of a lifeboat at New Brighton. No arguments are reported; the judgment consists of two lines; and the case cannot possibly be reconciled with the judgment of the Court of Appeal in *Re Weir's Hospital* [14] in which it was said: "There is no jurisdiction to apply *cy-près* so long as any lawful charitable object of the testator's bounty is available, however inexpedient such object may appear to the court." And again, "The court is not in a position to do what it pleases, but it must do that which is in accordance with the will of the testator."

Precisely the same criticisms apply to the third case quoted, *Re Orchard Street Schools*.[15] A free school had been founded under a trust which provided for a gift over to the British and Foreign Bible Society in the event of the school's discontinuance. The school premises were compulsorily purchased, but it was held that the gift over (expressly held to be valid) did not take effect unless it proved impossible to settle a scheme to deal with the application of the purchase money. In addition, the Vice-Chancellor appears to have held that the right of the donee of the gift over to claim the property was barred by a long-standing breach of trust on the part of the school trustees. The case does not seem to have been relied upon since.

It seems regrettable, with respect, that the authority of Danckwerts J. should be lent to fortify these old and dubious cases. The only question which the judge had to answer was whether he had jurisdiction to direct a scheme. It is submitted that this would arise only if the event giving rise to the gift over had not yet taken place and provided that a general charitable intention was implicit in the first gift; in such a case a scheme may be directed to provide for the disposition of the income in

[13] (1888) 58 L.T. 45 (Chitty J.).
[14] [1910] 2 Ch. 124, *per* Farwell L.J. at p. 135.
[15] [1878] W.N. 211 (Hall V.-C.).

the interim. In the facts of the present case it is submitted that there was jurisdiction only to do "that which is in accordance with the will of the testator" and declare that the gift over took effect when the first gift failed.[16]

Hamish Gray.

Damaged Goods at the Inn

The vexed question of the innkeeper's liability for damage or injury to his guest's goods has come before the High Court for the first time since 1931. In *Williams* v. *Owen* [1] Finnemore J. had to decide whether a guest could recover damages from an innkeeper for injury to his car in a fire in the hotel garage. The guest failed on two grounds: (1) as a result of the Fires Prevention (Metropolis) Act, 1774, s. 86 (which it is not proposed to discuss here), which protected the innkeeper even if he were under the same strict liability for damage to goods as he undoubtedly was for their loss, and (2) in any event, because an innkeeper is not under a strict liability for damage to goods, and the guest had failed to prove negligence.

In reaching the latter conclusion, Finnemore J. followed *Winkworth* v. *Raven*.[2] There, the guest left his car overnight in the innkeeper's unheated garage and it was damaged by frost. There was no negligence on the part of the innkeeper or his servants. In allowing the innkeeper's appeal Swift J. in the Divisional Court held that the innkeeper was not subject to strict liability for injury to goods, as opposed to their loss.[3]

It is a pity that in following this decision Finnemore J. did not refer to the criticism it has received. The most authoritative reference is to be found in the Law Reform Committee's second report, the signatories of which included six present or former judges: Cmd. 9161 of 1954.[4] Of Swift J.'s ruling on the innkeeper's liability for injury to goods the report says: "This

[16] And congratulate Christ's Hospital on their good fortune: *Re Upton Warren, Christ's Hospital* v. *Grainger, Re Tyler* and *Re Hanbey's W.T.*

[1] [1955] 1 W.L.R. 1293; [1956] 1 All E.R. 104.

[2] [1931] 1 K.B. 652.

[3] Is the innkeeper strictly liable only if the goods are lost by theft? Swift J. may have thought so: see [1931] 1 K.B. at p. 657. This would appear to follow from the historical reason often given for the innkeeper's liability, *viz.*, that it originated at a time when innkeepers were commonly in league with thieves. What, then, of total destruction of goods by fire? Finnemore J. thought it relevant to find that the car in *Williams* v. *Owen*, although no longer of any value as a motor-car, was still existing after the fire and could not in any ordinary sense of the word be said to be "lost": [1955] 1 W.L.R. at p. 1295. In some American jurisdictions the strict liability does not apply to loss by fire: *e.g.*, *Johnson* v. *Chadbourn Finance Co.* (1903) 94 N.W.Rep. 874 (Minnesota), noted 17 Harvard L.R. 47.

[4] Noted by L.J. Blom-Cooper at (1955) 18 M.L.R. 375.

statement, although frequently quoted, was probably unnecessary for the decision of the case, which could have been decided on the narrower ground that an innkeeper's liability to supply accommodation is satisfied by providing accommodation which is reasonably fit for the purpose." This principle formed the second part of Swift J.'s decision. It was also the subject of Macnaghten J.'s judgment although not, perhaps, the only ground as suggested by the Committee, for he commenced by agreeing with Swift J. in general terms and his judgment can be read as tacitly accepting the proposition that there is no strict liability for damage.

Had the learned judge considered this report, he might well have come to the conclusion that *Winkworth* v. *Raven* could not be thrown on one side as easily as the Committee suggested, for there are really no grounds for holding that Swift J.'s reason was *obiter*. It is surely clear that the plaintiff must have succeeded if there *were* strict liability for damage to goods. Only if there were no strict liability would it become relevant to consider the innkeeper's duty to his guest to provide accommodation reasonably fit for its purpose, and whether he had broken this duty. If the goods had been stolen, consideration of the innkeeper's duty would clearly have been unnecessary.

Although *Winkworth* v. *Raven*, a decision of the Divisional Court, was at first sight binding on Finnemore J., a probing of the earlier decisions would, it is submitted, have freed him from accepting it otherwise than as a persuasive authority. In relation to its persuasive effect, his opinion that " the courts of today would hesitate in extending what is, after all, an anomalous position " (*i.e.*, the innkeeper's strict liability for loss of goods) may be compared with the Committee's view that no logical distinction can be drawn between the loss of goods and damage to them.[4a]

Swift J. in *Winkworth* v. *Raven* purported to follow *Dawson* v. *Chamney*,[5] where it was held that an innkeeper was not strictly liable for injury to a guest's horse, but a careful reading of this case indicates that the court was not distinguishing between loss of goods and damage to them but was applying what it erroneously thought was a general rule relating to an innkeeper's liability.[6] So, too, the criticism of this case in *Morgan* v. *Ravey*,[7] which was

[4a] The Committee's view has been adopted in clause 1 (2) of the Hotel Proprietors Bill now before Parliament which will, if passed, come into operation on January 1, 1957.

[5] (1843) 5 Q.B. 164.

[6] The court apparently thought that even in cases of loss of goods the innkeeper could escape liability by proving that he had not been negligent. This misconception arose from the words in the ancient writ, cited in *Calye's Case* (1584) 8 Co.Rep. 32a. The writ uses the phrase " *pro defectu hujusmodi hospitatorum seu servientium suorum*," but it is now undoubted that (certainly in the case of loss of goods) the defect lies in the loss and in no more, negligence being immaterial. The ancient writ itself, referring to " *eurum bona et catalla infra hospitia illa existentia absque subtractione*," may not distinguish between loss and damage.

[7] (1861) 6 H. & N. 265.

not accepted by Swift J. because the latter case dealt with loss of goods, shows that the Court of Exchequer saw no difference in law where the goods were injured and where they were lost.

The Law Reform Committee has, furthermore, pointed out that in 1863 Parliament apparently considered the law to be the same in the case of loss of or injury to goods, by giving the innkeeper certain protection in both cases in the Innkeeper's Liability Act. Unfortunately, the value of this argument is diminished when it is remembered that the 1863 Act applies equally to Scotland, where there is undoubtedly no distinction: *Mustard* v. *Paterson*.[8]

In the same year as the Act came the decision of the Court of Exchequer in *Day* v. *Bather*,[9] which was not cited in *Winkworth* v. *Raven*. In this case an innkeeper was held liable for injury to a horse while being exercised by an ostler. Finnemore J. dismissed a reference to this case with " I think those facts are very different from the present ones," apparently considering that the decision was based on the innkeeper's vicarious liability for the ostler's negligence, whereas the report indicates that the case was decided on the broad issue of the innkeeper's liability. All three judges (Pollock C.B., Martin and Bramwell BB.) seemed to think that the question of whether the relationship of innkeeper and guest existed at the material time was fundamental.

Winkworth v. *Raven* has been followed on a number of occasions in county courts, but was distinguished by Davitt J. in *Douglas Iron Works* v. *Owen*.[10] There the inkeeper's servant drove away the guest's car to go to a dance. Returning in the early hours of the morning he wrecked the car. Davitt J. expressed the opinion that the innkeeper would have been liable, but dismissed the claim on the ground that the loss and damage were due to the guest's negligence in leaving his keys in the car.

In conclusion, it may be that *Winkworth* v. *Raven* and, now, *Williams* v. *Owen*, are inconsistent with earlier authorities, and that there is, in truth, no distinction between loss of goods and injury to them. If, however, those cases are correct, then there may be a distinction between damage to goods while within the hospitium of the inn, where negligence must be shown, and damage to goods following on their wrongful removal from the hospitium, as in *Douglas Iron Works* v. *Owen*. This may be the reason why *Watson* v. *People's Refreshment House Association*[11] was argued and decided on the basis of the innkeeper's strict liability, although the claim was in respect of injury to a motor-coach caused by an unknown person wrongfully driving it away and damaging it.

Aubrey L. Diamond.

[8] 1923 S.C. 142; see W. H. D. Winder in (1952) 102 L.J. 284.
[9] (1863) 2 H. & C. 14.
[10] [1951] I.R. 93.
[11] [1952] 1 K.B. 318.

Obstructing the Police

Section 12 of the Prevention of Crimes Act, 1871, applies "where any person is convicted of an assault on any constable"; section 2 of the Prevention of Crimes Amendment Act, 1885, provides that section 12 "shall apply to all cases of resisting or wilfully obstructing" a constable; the Act of 1885 also provides that it "shall be construed as one with" the Act of 1871. Though the enactment of these provisions appears to have caused Parliament few qualms,[1] their interpretation has led to a difference of opinion between the English and Scottish courts, from which it may be surmised that, though the recent decision of the Divisional Court in *Hinchliffe* v. *Sheldon*[2] may be welcome across the Border, the dictum in which Lord Goddard C.J. purports to state the principle upon which the decision rests may not be so readily acceptable. The appellant in that case, the son of the licensee of an inn, arrived home after permitted licensing hours and seeing the police outside the premises, shouted a series of warnings to the licensee. When the police sought admission, there was a delay of eight minutes and, on their entry, though there may have been some reason for suspicion, there was no evidence establishing an offence. The appellant was convicted of obstructing the police, but he appealed to the Divisional Court, where he relied on *Bastable* v. *Little*,[3] in which it was held that a warning of a police trap given to a motorist who had committed no offence is not an obstruction. In *Betts* v. *Stevens*[4] it was held that if the motorist has already committed an offence such a warning is an obstruction. The appellant in *Hinchliffe* argued that he could not be convicted unless it were shown that an offence had been committed before he gave the alarm; but the Divisional Court distinguished *Bastable* v. *Little* on the ground that here the police had a right to enter the premises by virtue of section 151 (1) of the Licensing Act, 1953, which provides that "a constable may at any time enter licensed premises . . . for the purpose of preventing or detecting the commission of any offence under this Act." With respect, this is not the distinction between the two cases, for in *Bastable* v. *Little* the constable also had the right to enter the place where he had laid the trap, for the purpose of preventing or detecting the commission of an offence against the relevant Act.

[1] The only objection taken to the Bill of 1871 related to the inadequacy of the penalty in view of the fact that "it was frequently regarded as a matter of amusement, by classes who should know better, to assault the police in a brutal manner." The only objection to the amending Bill in 1885 was that of an Irish member who claimed that "police officers in Ireland executed their duty in such a way that it was rather meritorious than otherwise to obstruct them" (though he added magnanimously that "if the Bill were limited to England he had no objection"). In the event, the Bill was not applied to Ireland, for the peer who had insisted on its doing so "was not in his place [in the Lords] to advise them what to do."

[2] [1955] 1 W.L.R. 1207; [1955] 3 All E.R. 406.

[3] [1907] 1 K.B. 59.

[4] [1910] 1 K.B. 1.

This point was indeed taken in *Betts* v. *Stevens* where it was argued that the police had no duty to act as they had done, but all members of the court—Lord Alverstone C.J.,[5] Darling J.[6] and Bucknill J.[7]—expressly held that it was the duty of the police to be where they were, to collect evidence. It is submitted, therefore, that the distinction between *Hinchliffe* and the motoring cases does not lie in any difference in the duties of the police in the respective cases; it lies in the difference between the respective acts of obstruction. In the motoring cases, others were prevented from approaching the police; in *Hinchliffe* the police were prevented from approaching others. In the motoring cases, there was no physical obstruction of the police; in *Hinchliffe* the appellant's act was tantamount to preventing the opening of the door to the constables and was therefore tantamount to a physical obstruction placed in their path. Is, then, the distinction between a physical and a non-physical obstruction material?

In *Bastable* v. *Little* counsel persuaded Ridley J.[8] that an obstruction must amount to physical force or threats, but both Darling J. and Lord Alverstone C.J.[9] thought otherwise; and the conviction of the defendant in *Betts* v. *Stevens* confirmed the latter view. In Scotland, however, the contrary has clearly been decided in *Curlett* v. *M'Kechnie*,[10] where it was held that the statutory context in which the word obstructing is found means "that the word is so used as to associate it with physical interferences only, and to contrast it with mere adverse influence or trickery"[11]; and *cf. per* Lord Fleming[12]: "the words 'wilfully obstructing' are used in association with the words 'resisting' and 'assault,' and the reasonable inference is that the words 'wilfully obstructing' must have the same character as the other matters dealt with in the two relevant sections. In my opinion, to bring a case within these sections it must be proved that the obstruction had some physical aspect." Since the word "obstructing" must be construed on the principle *noscitur a sociis*, it followed that a mere false statement to the police, however misleading, could not be an "obstructing" within the Act. Equally, it would seem, correct information to a criminal, and *a fortiori* to an innocent person, cannot be an obstruction. It has been submitted above that the act of the appellant in *Hinchliffe* was tantamount to a physical obstruction; and, on that ground, it may be said that the decision in that case is not at variance with that in *Curlett* v. *M'Kechnie*. But in *Hinchliffe* Lord Goddard C.J. appears to base the court's

[5] At p. 7.
[6] At p. 8.
[7] At p. 9.
[8] At p. 62.
[9] On second thoughts, at p. 63.
[10] 1938 S.C.(J.) 176; 1939 S.L.T. 11.
[11] *Per* Lord Moncrieff, at p. 180.
[12] At p. 179.

decision upon the principle that "'obstruction' means, for this purpose, making it more difficult for the police to carry out their duties." [13] This is at variance with the Scottish decision and it is submitted that the principle here enunciated is too wide: it would mean, for example, that a guilty man who tells the police that he is not guilty is thereby guilty of obstructing the police. It would also mean that a person liable to a fine of 40s. for failing to give his name and address under section 175, Schedule 9, of the Representation of the People Act, 1949, would also be liable to be imprisoned for obstructing the police constable who asked for his name. The principle enunciated by Lord Goddard C.J. might be tenable if the word obstructing were without a controlling context—as, for example, it is in sections 35 and 36 of the Malicious Damage Act, 1861; in section 288 of the Public Health Act, 1936; and in regulation 83 of the Defence (General) Regulations, 1939—and *a fortiori* where the word is found in the same context as "mislead," "interfere" or "impede," as in section 3 of the Official Secrets Act, 1920. But where it is found in the controlling context of "assault, resist or obstruct," it is submitted that the Scottish is to be preferred to the English opinion.

That the same statutory provision should bear one meaning in England and another in Scotland is obviously unfortunate. Such cases are not, however, wanting. Thus, the decision in *Tucker* v. *Mackenzie* [14] that an accident damaging only the driver's car must be reported is at variance with the implication to be drawn from *Pagett* v. *Mayo*.[15] Again, the decision in *Reid* v. *Nixon*, *Dumigan* v. *Brown* [16] that a doctor called in by the police is "the hand of the police" conflicts with the view expressed in *R.* v. *Nowell* [17] that he is an independent witness. (The Irish Courts, it may be remarked, have recently adopted the Scottish view: *The State* (*Sullivan*) v. *Robinson*.[18]) It would be unfortunate were another division of opinion to arise from the belief that *Hinchliffe* v. *Sheldon* (*supra*) is authority for Lord Goddard's dictum that obstructing means "making it more difficult for the police to carry out their duties." His Lordship has recently reiterated the suggestion that a period of limitation should run against dicta; with respect, even this would not solve the problem, for it is during the early years of their existence that dicta are most likely to be harmful. But, whatever the principle on which *Hinchliffe* v. *Sheldon* rests, that case leaves the relation between *Bastable* v. *Little* and *Betts* v. *Stevens* still to be decided: that relation cannot, for example, now be described in the terms employed in Halsbury (Simonds), X, 634. If a warning may *per se* be an

[13] [1955] 3 All E.R. 408F.
[14] 1955 S.L.T. 55.
[15] [1939] 2 K.B. 94.
[16] 1948 S.C.(J.) 68.
[17] [1949] 1 All E.R. 794.
[18] 88 Ir.L.T.R. 169.

obstruction, will liability for giving a warning depend exclusively on the ultimate intention of the person giving the warning (as Darling J. suggested)?[19]

While the Divisional Court in England were thus concerned with an interference which did not amount to an assault, the Divisional Court in Northern Ireland were concerned with an assault which did not amount to an interference. In *Minister of Agriculture* v. *Marmion*[20] the owner of pigs which were being seized by the police struck the sergeant who had ordered the seizure and who was then standing by. Although the assault did not in any way interfere with the activities of the men removing the pigs, the seizure of which was not impeded or abated or affected by the assault, the Divisional Court held that the assault was an obstruction. But three distinct opinions emerge: (i) Lord MacDermott C.J. so decided because "the offence charged does not necessarily connote any actual hindering or impeding of the person alleged to be obstructed"[21]; (ii) Black L.J. so decided because the sergeant's duty was superintendence and "the assault being clearly calculated to distract (his) attention" was therefore an obstruction; (iii) Sheil J. (dissenting) held that there was no ground for interfering with the finding of fact that the assault did not cause an obstruction.

J. A. Coutts.

Objectivity in Murder

"No one," said Pollock C.B., "could commit murder unless he was conscious that the act done was likely to cause death."[1] Even prior to the case of *Ward*,[2] it might have been objected that this was not an accurate expression of the rules of *mens rea* in relation to murder, for it does not cover cases of felony-murder or death caused in resisting lawful arrest: nor is it sufficiently wide to reach the person who merely intended grievous bodily harm, but who is nevertheless guilty of murder under the modern law if death follows. Subject, however, to these qualifications, few would have quarrelled with the gravamen of the Chief Baron's dictum—that the essence of the crime of murder lies in the accused's realisation that his conduct is likely to produce death or grievous bodily harm.

It is little short of astonishing, therefore, that in *Ward* the Court of Criminal Appeal should have rejected this subjective test in favour of an objective standard. It appears from the reports available that reference to authority was at a minimum and the

[19] In [1907] 1 K.B. 63 and [1910] 1 K.B. 8.
[20] [1955] N.I. 224.
[21] p. 229.
[1] *Vamplew* (1862) 3 F. & F. 520.
[2] [1956] 1 Q.B. 351.

court did not even find it necessary to call upon counsel for the Crown to argue the point. The appellant, Ward, had been convicted of the murder of an eighteen-months' old child in circumstances which were not clearly established by the prosecution at the trial. The child's body had been discovered in an advanced state of decomposition some twenty months after death. There was evidence that the skull was fractured in two places but that these injuries alone would not have been sufficient to cause death, and a theory of the prosecution's medical witness was that death was probably due to asphyxia. That the jury did not accept this theory seems likely from the note sent by them to the trial judge during their deliberations, in which they sought further direction on the law. Ward's explanation in evidence was that, angry and exasperated, he had picked up the child and shaken her with full force to make her stop crying and as he put the child down again, her head dropped forward and sideways. He had no intention of killing or hurting the girl in any way. It was admitted at all times that Ward was of sub-normal intelligence.

At the trial Pilcher J. directed the jury that "if when he did the act which he did do he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child as a result of what he did, then . . . he is guilty of murder. If, on the other hand, he could not as a reasonable man have contemplated that death would result in consequence of what he did, then he is guilty of manslaughter." Later the learned trial judge reiterated the direction saying: "if when the prisoner did the act he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result, he was guilty of murder."

Ward was convicted of murder and appealed to the Court of Criminal Appeal (Lord Goddard C.J., Stable and Ashworth JJ.) on the grounds that the direction should have been in accordance with the subjective test as opposed to the reasonable man standard which the learned trial judge had adopted. This submission the court rejected, Lord Goddard holding that the direction of Pilcher J. was "unimpeachable." The Lord Chief Justice continued: "the test must be applied to all alike and the only measure that can be brought to bear in these matters is what a reasonable man would or would not contemplate," a reasonable man being "a person who cannot set up a plea of insanity." No authority was referred to in the judgment of the court, although the cases of *Larkin* [3] and *Lumley* [4] appear to have been cited in argument.

As counsel pointed out, the direction of Pilcher J. seems to have been based upon the dicta of Avory J. in *Lumley*. This case is readily to be distinguished from the present, for it is clear that in *Lumley's* case, as in the earlier abortion cases of *Whitmarsh* [5] and

[3] (1943) 29 Cr.App.R. 18.
[4] (1911) 22 Cox C.C. 635.
[5] (1898) 62 J.P. 680.

Bottomley and Earnshaw,[6] the trial judge was dealing with facts theoretically falling within the old felony-murder rule. In each of these three cases an attempt was made to avoid the harshness of this rule (in which the accused's state of mind would be almost irrelevant) by suggesting a test which would bring into question his realisation of the consequences of his acts. And it should be noted that no suggestion was apparently made in *Lumley* or the other abortion cases mentioned that the accused was other than a reasonable man, so that the direction there given need not be construed to deny the subjective test.

It is submitted with the greatest respect that the ruling in *Ward* is clearly contrary to the development of the principles of *mens rea* which had been thought to have produced at the present time an essentially subjective test, especially with regard to crimes of extreme gravity. The decision seems to have been reached as a result of a fallacy which has oft-times been pointed out, but which has none the less bedevilled English law on many occasions—the fallacy which arises when the evidence in proof of a proposition of law becomes confused with that proposition. It is one thing to say that a man's intention with regard to his acts may be inferred from what reasonable people would intend when so acting; it is another thing to say that he must have had that intention because reasonable people would have so intended. Holdsworth stressed the error when saying: "We must adopt an external standard in adjudicating upon the weight of evidence adduced to prove or disprove *mens rea*. That, of course, does not mean that the law bases criminal liability upon non-compliance with an external standard."[7] The same error, as Jerome Hall points out,[8] underlies Holmes' early theory of objectivity.

It has been suggested that the decision in *Ward* may be of little practical significance in view of the likely abolition of the death penalty, and in view of the fact that in most cases people who act in such a way as to cause grievous bodily harm do appreciate, as does the reasonable man, the consequences of such conduct. But it is submitted that the question of principle arising from *Ward's* case involves much more than the immediate effects of the decision on the law of homicide. The last few decades have seen in certain cases the culmination of the movement towards a subjective test in criminal law. *Wilson* v. *Inyang*,[9] for example, seems to have established that the doctrine of mistake in criminal law is no longer to be fettered with tests of "reasonableness." On the other hand, over the same period, defences of a subjective nature have been further and further limited until their character has become artificial and completely objective. Perhaps the best

[6] (1903) 115 L.T.J. 88.
[7] *History of English Law*, Vol. 3, p. 374.
[8] *Principles of Criminal Law*.
[9] [1951] 2 K.B. 799.

example of this is the doctrine of provocation. The result of these conflicting trends is that it is impossible at the present day to deduce any coherent principles in many branches of the existing law, and almost futile to attempt to prognosticate the development of principle on the part of the courts. Why this search for objectivity should be so strong it is difficult to assess. It may be that the courts properly fear the introduction of specious defences which depend primarily upon the accused's own testimony as to his state of mind, which evidence may not easily be refuted. But to restrict the development of the law in this sphere at a time when the greatest of strides is being made by the medical profession into the diagnosis and understanding of a variety of mental conditions must inevitably lead to further disharmony of law and public opinion. There are abundant lessons from the past to show that such conflict can be of nothing but detriment to the administration of justice. Objectivity may be bought at too high a price.

William E. Denny.

F.O.B. Contracts

Statements regarding the obligations of the respective parties to a f.o.b. or f.a.s. contract have often assumed that there is but one type of such contract and that the obligations of the buyer and seller are the same in all cases. In fact this is not in accord with mercantile practice. If an English exporter buys f.o.b. from an English supplier, he, the exporter, may not expect the seller to attend to any of the formalities attending the export beyond putting the goods over the ship's rail. If any export licence is required the buyer will have to attend to this; indeed, the seller will probably not know sufficient about the export transaction arranged by the buyer to enable him to do so. To this extent the well-known decision in *Brandt* v. *Morris* [1] clearly gives effect to mercantile custom.

But is the position the same when the English exporter in turn sells f.o.b. to a foreign buyer? The practice is certainly different. The foreign buyer will not be allowed to apply for the export licence; all he could do would be to ask the English supplier to do so. But he may not know who the supplier is, for the English export merchant will often not wish his foreign customer to have any contact with the supplier lest he approach the latter directly in future. Does the law nevertheless throw the risk of a refusal of the export licence on the buyer? If it is refused will he be liable for breach of contract if he refuses to nominate a ship to carry the goods to some other port not requiring a licence, *e.g.*, coastwise

[1] [1917] 2 K.B. 784, C.A.

from London to Hull? Such a conclusion would clearly be wholly unreasonable, and happily it is not the law.

In *A. V. Pound & Co.* v. *M. W. Hardy & Co.*[2] the facts differed slightly, but not essentially, from the example just considered. English sellers agreed to sell to English buyers a quantity of Portuguese turpentine f.a.s. Lisbon, the destination being, to the sellers' knowledge, a port in Eastern Germany. A Portuguese export licence was required and could only be obtained by the original Portuguese suppliers whose identity was unknown to the buyers. The contract made no express provision regarding the licence. The buyers nominated a ship proceeding from Lisbon to Rostock and the sellers arranged with their suppliers for application to be made for a licence. The licence was refused. The buyers thereupon repudiated the contract and the sellers sued. It was held by the House of Lords (affirming the Court of Appeal reversing McNair J.) that the action failed.

The House held that *Brandt's* case, *supra*, did not lay down a general rule applicable to all f.o.b. and f.a.s. contracts. The obligations depended on the circumstances in each case. Here the circumstances differed from those in *Brandt* in two respects:

(1) Here the export licence was required at the time when the contract was made; in *Brandt* the need supervened after the date of the contract but before delivery. It is, with respect, a little difficult to see the relevance of this distinction for present purposes. Had the issue been frustration it would indeed have been relevant, but one would have supposed that it would have been more (rather than less) difficult to hold in the present case that the contract was frustrated. But the House did not have to determine whether frustration applied or not: that would only have arisen if the buyers had sued the sellers. Then, as Lord Somervell pointed out, the answer would depend on whether either party was under an absolute obligation to obtain a licence or merely under an obligation to use his best endeavours. And the parties' knowledge or ignorance, at the time of the contract, of the need for a licence might well be relevant.

(2) Here the buyer was not in a position to apply for the licence; in *Brandt's* case either buyer or seller could have done so. This, it is submitted, is the crucial point. In effect the courts have at last recognised that there are, as pointed out above, two different types of f.o.b. or f.a.s. sales. The House did not suggest that, even in the "domestic" type exemplified in *Brandt's* case, there would always be an absolute obligation on the buyer to obtain any necessary export licence. On the contrary, their Lordships were careful to say that each case depended on its circumstances. But it seems reasonable to assume that, in the absence of a contrary express term or course of dealing, *Brandt's* case will be followed in

[2] [1956] 2 W.L.R. 683; [1956] 1 All E.R. 639, H.L.

"domestic" f.o.b. sales, at any rate if the buyer is in a position to apply for the licence. In cases between a home merchant and a foreign buyer or, as in the present case, between two foreign buyers it can be assumed that the normal construction of the English courts will be that it is for the seller to apply. It is submitted, however, that his obligation should normally be construed as merely one to use his best endeavours, so that if a licence is refused without his default the obligations of both parties are ended. This, it is thought, would accord with the expectation of businessmen.

The great merit of the decision is that it introduces into the law of f.o.b. sales a much needed element of flexibility which will enable it to develop in accordance with mercantile practice. It is perhaps unfortunate that the case law on c.i.f. contracts seems to have hardened into inflexible rules which preclude a similar freedom for development.[3]

L. C. B. G.

Rylands *v.* Fletcher—Liability for Personal Injuries—Defence of Novus Actus

Two points of legal interest are raised by the recent case of *Perry* v. *Kendricks Transport, Ltd.*,[1] one of which had for long been well settled, whilst the other is still a matter of some doubt. The facts in this case were that the plaintiff, a boy of ten, was returning home from school one day by crossing some waste land, and was approaching land used by the defendants as parking ground when he saw two other boys, both of about his age, standing on a bank at the southern end of the defendants' parking ground and near the side of a Leyland coach. As he approached them the two boys jumped away and immediately afterwards there was an explosion in the petrol tank of the coach resulting in the plaintiff being very badly burned and injured.

Lynskey J., sitting at the Birmingham Assizes, had found that the cap screwed by the defendants on the entrance pipe of the emptied petrol tank had been removed by some unknown person and that the petrol fumes in the tank had been exploded by a lighted match thrown into the tank by one of the two boys as the plaintiff approached them. The defendants also proved that they had a careful and regular inspection of their parked coaches and that, although children were accustomed to playing on them, they were, whenever seen, chased away by the defendants' employees. In these circumstances, his Lordship had dismissed the plaintiff's

[3] *Cf.* Devlin J. in (1951) 14 M.L.R. 249 at pp. 263 *et seq.*
[1] [1956] 1 W.L.R. 85. The case is also reported at [1956] 1 All E.R. 154.

claim for personal injuries, holding that there had been no negligence on the defendants' part and that the rule in *Rylands* v. *Fletcher* [2] did not apply to render them liable.

The Court of Appeal (Singleton, Jenkins and Parker L.JJ.) unanimously took the view that, for the purposes of the rule in *Rylands* v. *Fletcher*, a motor-coach with an emptied tank containing inflammable petrol vapour was something "likely to do mischief if it escapes." Parker L.J. here expressly relied upon *Musgrove* v. *Pandelis*,[3] though his Lordship also pointed out that the decision in that case had been the subject of some criticism.

On the perhaps more interesting and still controversial question whether or not a claim for personal injuries would lie under the rule, Singleton L.J. answered that he "assumed" it would. Jenkins L.J. apparently nowhere adverted to this point, though it can be inferred from the tenor of his Lordship's judgment that he would have answered the question in the affirmative. Parker L.J. expressly said that he did not think it was open to the Court of Appeal to hold that the rule only applied to damage to adjoining land or to proprietary interest in land and not to personal injuries; true that in *Read* v. *Lyons & Co.*[4] some of the Law Lords doubted whether the rule extended to cover personal injuries, but the final decision in the matter was expressly left over, and "as the matter stands at present, I think we are bound to hold that the defendants are liable in this case, quite apart from negligence, unless they can bring themselves within one of the well-known exceptions to the rule." [5]

The doubts expressed *obiter* on this point in *Read's* case would appear to have derived from the views, particularly of Lords Macmillan and Uthwatt, that the rule appertained only to the mutual duties of adjoining or neighbouring land owners or occupiers *qua* owners or occupiers with respect to the use of their lands. Lord Macmillan said quite emphatically [6] that the rule was based on the injunction *sic utere suo ut alienum non laedas*, and that it was therefore manifest it had nothing to do with personal injuries, the duty being to refrain from injuring not *alium* but *alienum*.

Support for the view that the rule is based on the Latin maxim just quoted is to be found, *inter alia*, in Lord Cranworth's judgment in *Rylands* v. *Fletcher* itself [7]; in the Judicial Committee of the Privy Council's as delivered by Lord Moulton in *Rickards* v. *Lothian*,[8] and in Bankes and Duke L.JJ. in *Musgrove* v. *Pandelis*.[9] This maxim, however, with its "blessed vagueness," [10]

[2] (1868) L.R. 3 H.L. 330.
[3] [1919] 2 K.B. 43.
[4] [1947] A.C. 156.
[5] p. 92.
[6] p. 173.
[7] p. 341.
[8] [1913] A.C. 263, 275.
[9] pp. 47, 51.
[10] Winfield, *Textbook*, 6th ed., p. 587.

affords no convincing explanation of why in several cases, now the plaintiff, and now the defendant had to be the loser, nor could it have been the basis of the rule in *Ryland's* case any more than it could have been the real basis of, say, liability for nuisance or for negligence arising from a defendant's use of his land or chattels. If, therefore, it proves so unreliable a guide, it seems very difficult to see how the very important issue whether or not *Ryland's* case applies to personal injuries should be made to depend on any kind of inference from its literal translation. Lord Macmillan himself in *Read's* case had said that the congeners of the rule were trespass and nuisance. Trespass, as everyone knows, could be to land, to goods, as well as to the person, and in the highway cases, at any rate, nuisance applies to personal injuries, quite apart from its general application to interference with the personal comfort and to damage to proprietary interests of land owners or occupiers.

In a question of this kind, sight, of course, should not entirely be lost of the often-quoted [11] warning of Lindley L.J. in another connection, in *Green* v. *Chelsea Waterworks Co.*,[12] that "That case [*Rylands* v. *Fletcher*] is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision." But equally too much can be made of the mere accidents of litigation, and no less oppression as well as inconsistency within the law might result if the application of previous authorities were to be rigidly confined only to subsequent cases *in pari materia* in the most literal sense.

In view of what Parker L.J. said in *Perry's* case it seems claims for personal injuries can now be excluded from the scope of the rule in *Rylands* v. *Fletcher* only by an express decision of the House of Lords to that effect.[13] Judicial development of the law cannot, it is true, lightly break free from precedents and well-considered dicta. But barring the not particularly enlightening Latin maxim already mentioned and perhaps an inclination in the courts to limit the application of rules of strict liability whenever considered desirable, there is little, if anything, either in logic, in justice, or in the very nature of the rule itself to warrant such restriction on its scope. To do so would amount to admitting into the law of tort yet another instance of the "jurisprudence of conceptions"—that modern variant of the old forms of action and like its precursors, quite capable of forsaking reality for form and of sacrificing justice on the altar of mere

[11] *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co., Ltd.* [1936] A.C. 108, 119, *per* Lord Wright; *Read* v. *Lyons & Co.* [1947] A.C. 156, 167, 178, *per* Viscount Simon and Lord Porter respectively.

[12] (1894) 70 L.T. 547, 549.

[13] Such a decision would have to overrule a number of previous cases on this point: *Miles* v. *Forest Rock Granite Co., Ltd.* (1918) 34 T.L.R. 500 (C.A.); *Shiffman* v. *Grand Priory, etc., of St. John of Jerusalem* [1936] 1 All E.R. 557 (Atkinson J. *obiter*); *Hale* v. *Jennings Bros.* [1938] 1 All E.R. 579 (C.A.).

phrases and sheer technicalities. Questions of "causation" and "remoteness" apart, it would seem more rational and, it is submitted, more just, if the law finally comes down on the side of the view that, within the rule in *Rylands* v. *Fletcher*, damage is damage, no matter whether it is to person or to property.

The other point more fully considered in *Perry's* case was whether or not the defendants were entitled on the facts to rely on the defence that the escape of the thing which caused the damage was due to the "act of a stranger," an instance of the general defence of *novus actus interveniens*, and a well-recognised exception [14] to the rule in *Ryland's* case. However, even if the immediate cause of the escape is the act of a third party, the defendant will, as the authorities [15] also show, still be liable where it is proved that he has been personally negligent in not foreseeing the probability of such act and taking reasonable precautions to prevent it or to neutralise its effects. It was said by Jenkins L.J. in *Perry's* case (pp. 91–92) that in such circumstances "one reaches the point where the claim based on *Rylands* v. *Fletcher* merges into the claim in negligence: for if such a state of affairs could be made out, then it would no longer be necessary for the plaintiff to rely on *Rylands* v. *Fletcher* at all. He could rely simply on defendants' negligence." [16]

The Court of Appeal in *Perry's* case unanimously upheld the defence of "act of stranger" on grounds which can be summarised as follows. Two things had to happen before the explosion could have occurred—the removal by an unknown person of the cap screwed on the entrance pipe of the petrol tank, and the throwing of a lighted match into the tank by one of the two boys as the plaintiff approached them; there was no evidence of previous interferences of these kinds and none showing that the defendants should reasonably have anticipated and guarded against them by doing more than they had done in the circumstances, *i.e.*, screwing a cap on the entrance pipe, careful and regular inspection of their parked coaches, and chasing away children accustomed to playing on their parking ground whenever they were seen; since, therefore, they had not been guilty of any negligence, the explosion which injured the plaintiff must be regarded as having been caused by the "act of a stranger" over whom they had no control.

To the argument that the two boys by reason of their age —about ten years—were "incapable of deliberate and conscious act" or of "deliberate volition" and that therefore their act

[14] *Wilson* v. *Newberry* (1871) L.R. 7 Q.B. 31; *Box* v. *Jubb* (1879) 4 Ex.D. 76; *Rickards* v. *Lothian* [1913] A.C. 263.

[15] *Shiffman's* case, *supra*; *Northwestern Utilities, Ltd.* v. *London Guarantee, etc., Co.* [1936] A.C. 108; *Hanson* v. *Wearmouth Coal Co.* [1939] 3 All E.R. 47.

[16] See also Lord Wright in the *Northwestern Utilities* case, *supra*, and Goddard L.J. (as he then was) in *Hanson's* case, though in *Shiffman's* case Atkinson J. said *obiter* that a *Rylands* v. *Fletcher* claim could still be maintained as an alternative to one in negligence.

could not in law amount to *novus actus interveniens*, Singleton L.J. answered [17] that a boy of ten would know that it was wrong to throw a lighted match into a petrol tank, that to do so would be "asking for trouble," as shown by the two boys jumping off just before the explosion, and that they had therefore acted mischievously and deliberately. Parker L.J. pointed out [18] that it was not sufficient proof of negligence—which would have precluded the defence of *novus actus*—to show that the defendants knew that children played in the vehicle park, played on the roof of a motor or inside a coach; it must be shown that the defendants reasonably should have anticipated an act of the kind that would cause the escape. Jenkins L.J. said [19] that if the argument here put forward for the plaintiff were to be accepted in its full form, then if any mischievous boy chose to come on the defendants' land and chose to set fire to the petrol or to the petrol vapours in the tank of a vehicle there, the defendants would be liable; his Lordship, who was here adopting the dictum of Bramwell B. in a much earlier case, repeated with him: "that cannot be." [20]

There would have been nothing necessarily inconsistent between a tort of "strict liability" and a subsidiary rule that disallows the defence of *novus actus interveniens*. Indeed, if Sutton J., Cozens-Hardy M.R. and Farwell L.J. in *Baker* v. *Snell* [1] are right in their statement of the law, strict liability for *any* damage done by an animal *ferae naturae* or by one *mansuetae naturae* but known by the defendant to be ferocious would afford an example both of such a tort and such a subsidiary rule. If this is the law as to liability for damage done by vicious animals, then its greater strictness in this respect than under the rule in *Rylands* v. *Fletcher* can probably be traced to what Lord Simonds said in *Read's* case,[2] that "the law of tort has grown up historically in separate compartments and that beasts have travelled in a compartment of their own."

In *Perry's* case the Court of Appeal were content merely to reiterate that on the facts proved, the well-established defence of "act of a stranger" availed. Earlier authorities, however, seem to indicate that this defence was the product of a conscious choice by the courts in what Lord Simonds in *Read's* case [3] called "an age-long conflict of theories which is to be found in every system of law. 'A man acts at his peril,' says one theory. 'A man is not liable unless he is to blame,' answers the other." In the absence of personal negligence on the defendant's part, the courts,

[17] At p. 89.
[18] At p. 93.
[19] At p. 90.
[20] *Nichols* v. *Marsland* (1875) L.R. 10 Ex. 255, 259.
[1] [1908] 2 K.B. 352, 825.
[2] p. 182.
[3] p. 180.

without denying that *Rylands* v. *Fletcher* liability is strict, have chosen to draw the line once the "escape" could be attributed to the "act of a stranger" over whom the defendant had no control. They have done this sometimes by applying the test of reasonable foreseeability: *Box* v. *Jubb*; *Rickards* v. *Lothian*; *Perry's* case; sometimes by adverting to their duty, wherever practicable, to avoid reaching a decision that would be "wholly unreasonable": *Rickard's* case,[4] *i.e.*, in the words of Mellish L.J. in *Nichols* v. *Marsland*,[5] one that "would be contrary to all reason and justice."

One cannot but sympathise with the unfortunate boy in *Perry's* case, who found himself in the position of a losing plaintiff whose serious injuries could in no sense be ascribed to anything of his own doing. As the law now stands, however, it is difficult to see how the Court of Appeal could have proceeded to find in his favour except by taking the unusual step of reversing the trial judge's finding of fact that there had been no negligence at all on the part of the defendants.

F. A. Ajayi.

"Free of Exchange"

The question before the Privy Council in *National Mutual Life Association of Australasia* v. *Attorney-General for New Zealand*,[1] was, as Lord Reid put it when delivering the Board's opinion, "difficult, but . . . narrow in scope." The appellants were the owners of New Zealand Inscribed Stock entered in the New Zealand Treasury's register at Wellington and expressed in pounds, but marked "Principal and interest payable at Melbourne free of exchange." Were the appellants entitled to New Zealand pounds or to Australian pounds? Their Lordships' decision in favour of the latter view rested exclusively on the construction of the words "free of exchange"; this clause probably does not occur frequently and has no technical meaning, so that the implications of the decision are unlikely to be of wider impact. However, it is not without general interest. There cannot be any doubt that, where the monetary obligation of a sovereign State is expressed in terms appropriate to such State's monetary system, the obligation is presumed to be expressed in the currency of that monetary system. On the other hand, where, as in the present case, the place of payment is expressly fixed by the parties, doubts as to the identity of the money of account contemplated by the parties are likely to be resolved in favour of the *moneta loci solutionis*. What, then, is the position where a conflict between these two presumptions arises?

[4] p. 282.
[5] (1876) 2 Ex.D. 1, 5.
[1] [1956] A.C. 369.

It was largely on this issue that the Full Court of the Supreme Court of New Zealand was divided.[2] While, as has been mentioned, the Privy Council did not find it necessary to decide the problem, there are in Lord Reid's opinion very clear indications to the effect that the presumption in favour of the currency of the place of payment is the considerably weaker one. Thus Lord Reid referred to it being necessary "to overcome the presumption which has to be overcome if the respondent is to succeed."[3] He also stated "that, if there is only one place of payment, that is an important, though not decisive factor in determining whether the currency of the Government . . . or the currency of the place of payment is the measure of the obligation."[4] The modern tendency not to overrate the legal significance of the place of payment is to be welcomed. But the decision of the Privy Council should not lead to generalisation. Whether, for the purpose of defining the money of account, the status and character of a debtor other than a Government are really of greater weight than the express clause fixing the place of payment, is a question which will need much further consideration.

F. A. Mann.

Ultra Crepidam

Mr. Megarry's entertaining and provocative note[1] on the subject of "The House of Lords and Scottish Appeals" misconstrues the main criticisms of Scottish lawyers on the question. These do not stem from racial pride or prejudice. The problem as to whether judges should stick to their professional last had or has its counterpart even within the English legal system. Before the Judicature Acts—and to some extent since—the English Chancery lawyer would doubt the wisdom of leaving the final decision in specialties of Equity to Common lawyers who had no special experience of Chancery practice. If "taught law is tough law," it is to be expected that a judge will continue in the habit of legal thought to which he has been trained—though by constant contact with other methods and distinguished judges trained therein, he may well alter or modify his original approach to legal questions. The legal training of English and Irish lawyers is very similar. Lords of Appeal thus trained have a natural tendency to translate a Scottish problem into the categories familiar to them, but would hesitate to overthrow deliberately a principle of Scottish law where they recognised it as such. Being men of exceptional calibre, they make relatively few mistakes in administering an unfamiliar system. In the past, English trained judges

[2] [1954] N.Z.L.R. 754.
[3] [1956] A.C. at p. 385.
[4] p. 387.
[1] (1956) 19 M.L.R. 95.

of Scottish descent were among the most active anglicisers of Scots law, while in modern times it has quite often been through Scottish judges in the House of Lords that unwelcome English doctrines have been forced on Scottish law and, it must be confessed, that the Scottish courts are too often left gnawing the husk which English law has in its wisdom eventually thrown away. Scottish Lords of Appeal such as Lord Robertson in *Cameron* v. *Young*,[2] and Lord Dunedin (*horresco referens*) in *Dumbreck* v. *Addie*,[3] imposed on the Scottish law of *culpa* the doctrine of *Cavalier* v. *Pope*[4] and the rigid categories of invitee, licensee and trespasser. *Obiter dicta* of Lord Robertson and Lord Watson, sitting with English trained judges, sought to incorporate into Scots law the doctrine of absolute liability for dangerous agencies and to reject the doctrine of *aemulatio vicini*.[5]

Very few Scottish appeals are determined by the House of Lords each year. About six may be disposed of annually—some involving no specialties of Scottish law. These can make no great impression in the habit of thought of the English trained Lords of Appeal. On the other hand, the Scottish Lords of Appeal are constantly applying their minds to questions of English law—and indeed when at the Bar have had to consider constantly the law from over the Border. Cockburn's objections in 1852 to the proposal of sending a Scottish judge to the House of Lords on a permanent basis[6] were first that "the transplanted Scotchman *must* lose his Scots law. Nothing oozes out of a man so fast as law," and, secondly, that there was no security that the fittest man would be chosen for appointment to the House of Lords—where his influence as an interpreter of Scots law would be considerable. The great increase of legislation common to both countries makes it more expedient today than in Cockburn's time that Scottish judges should sit permanently in the House of Lords. The Scottish legal profession as a whole wish to retain appeals to the House of Lords. The Law Society of Scotland, however, urged on the Royal Commission on Scottish Affairs—which evaded the issue—that a Committee of the House should sit in Edinburgh to hear the few Scottish appeals which are brought each year. If this solution were accepted, then the Committee could be reinforced *ad hoc* by Scottish judges who were members of the peerage and, no doubt, the advice of Senators of the College of Justice could also be obtained as required. A very substantial saving of expense would be achieved, while members of the Judicial Committee of the House and of the College of Justice in Edinburgh would benefit from a period of closer contact and increased understanding of each other's problems.

T. B. Smith.

[2] 1908 S.C. (H.L.) 7; [1908] A.C. 176.
[3] 1929 S.C. (H.L.) 51; [1929] A.C. 358.
[4] [1906] A.C. 428.
[5] [1902] A.C. 381, at pp. 393–394; [1895] A.C. 587, at pp. 597–598.
[6] *Journal*, 1874 ed., ii, 278.

Public Interest and the Scope of House of Lords Precedents

The decision of the House of Lords in *Glasgow Corporation* v. *Central Land Board*[1] is of most obvious importance to Scottish lawyers as reaffirming the inherent power of the Court of Session to override the objections of a Minister of the Crown, on grounds of public interest, to the recovery and production of documents. Less obvious but more general is the importance of the case as clarifying the law regarding the authority of House of Lords decisions as precedents. This question is of equal importance to Scottish and English lawyers.

The pursuers and appellants had raised an action to have it declared that the defenders in determining certain development charges under the provisions of the Town and Country Planning (Scotland) Act, 1947, had acted *ultra vires*. To support their contention the pursuers had moved the Lord Ordinary to grant a diligence for the recovery of documents from the defenders; but the defenders refused to produce certain of these, and in respect of them the Secretary of State granted a certificate to the effect that he had examined the documents in question and had formed the view that on grounds of public interest they ought not to be produced, because they belonged to a class which it was necessary for the proper functioning of the public service to withhold from production. As a result of the granting of this certificate the main issue contested was as to whether the Scottish courts retained an inherent power—not to investigate whether the Secretary of State's certificate was justified, but to overrule such a certificate on wider considerations of public policy incidental to the administration of justice. The Lord Ordinary and (on appeal to the Court of Session) Lord Russell considered that Scottish authorities over the past century supported the view that an inherent power to overrule the Crown's objection was still vested in the Court of Session—though in the circumstances they declined to exercise the power. Lord Carmont and Lord Sorn, on the other hand, with reluctance considered themselves bound by the House of Lords decision in an English appeal—*Duncan* v. *Cammell Laird*.[2] In that case, after some discussion of Scottish and pseudo-Scottish authority, seven Lords of Appeal, including Lord Thankerton and Lord Macmillan, had laid down as a rule of law that the courts must always accept a certificate of public interest given by a responsible minister, and cannot override the objection. When the *Central Land Board* case was appealed to the House of Lords, their Lordships were unanimous in their view that, notwithstanding *Duncan* v. *Cammell Laird*, the Court of Session still retains the

[1] 1956 S.L.T. 41; in Court of Session 1955 S.L.T. 155.
[2] [1942] A.C. 624.

power to override such objections—though in the circumstances of this particular case they decided that this power should not be exercised. Lord Radcliffe and Lord Somervell of Harrow in particular, however, considered that the facts were very near the borderline. Lord Radcliffe [3] expressed the hope that so valuable a power would not come to be regarded as " a mere ghost of theory having no practical substance," and he encouraged the Scottish courts not to abdicate by disuse in the twentieth century " a right of control which their predecessors . . . have been insistent to assert." Though a Minister within his own province may rightly consider the public interest, the Scottish courts must also consider the wider public interest that impartial justice should be done between citizen and the Crown, and on that account may override the Crown's objection.

The House of Lords expressly declined to apply to Scotland the rule laid down for the English courts in *Duncan* v. *Cammell Laird*. This was in itself an important clarification of the law regarding judicial precedent, since, though the matter was not expressly stated to have been a " general principle of jurisprudence," it seems to have been assumed by their Lordships in 1942 that the laws of Scotland and England were the same regarding the powers of the courts to override the Crown's claim to exclude evidence on grounds of public policy. Indeed the House (including two Scottish Lords of Appeal) had relied in large measure on the decision of Lord Eldon in the Scottish appeal *Earl of Home* v. *Vass* [4]—though this case had in effect been ignored by subsequent Scottish practice.

It has been suggested on several occasions by eminent judges, including Lords Dunedin, Porter and Wark, that if the House of Lords considers a question before it to involve a principle of jurisprudence common to Scottish and English law, the decision *must* be followed in both countries and by the House of Lords itself in a subsequent appeal, notwithstanding the fact that the subsequent appeal originated from a different natural jurisdiction.[5] On principle, such a rule would seem unjustified on the obvious ground that, unless there has been argument by counsel qualified to speak with authority on the patent or latent specialties both of Scottish and English law, the House of Lords is not in a position to decide whether the question *sub judice* is in fact one " of general

[3] p. 47.
[4] (1822) 1 Sh.App. 229.
[5] See authorities discussed by the present writer, *Doctrines of Judicial Precedent in Scots Law*, pp. 54 *et seq.*; *Development of the Laws and Constitution of the United Kingdom*, Part II (Scotland), pp. 629–630; also Glanville Williams (1942) 6 M.L.R. 80; Salmond, *Jurisprudence*, 10th ed., 180–181.; *cf.* Hughes, *Jurisprudence*, 224. Even a decision made on Scottish law in an English appeal would not seem to bind the Scottish courts—*e.g.*, *Elliot* v. *Joicey* [1935] A.C. 209; 1935 S.C. (H.L.) 57, discussed by the present writer, *op. cit.*, pp. 60 *et seq.*

jurisprudence" common to Scotland and England. Nor does the fact that eminent Scottish and English judges sit together to determine such questions obviate the need for critical analysis from the Bar. The "*ipse dixit*" of the House of Lords can scarcely make a point of common or general jurisprudence out of a legal situation as to which the solutions or principles of Scotland and England may diverge in similar or slightly different circumstances. The editors of Jarman on *Wills* [6] aptly observe of the House of Lords decision in the Scottish appeal *Young* v. *Robertson* [7]: "Strictly the decision bears only upon Scots law; and although the Scotch and English rules on the subject were treated as identical, it is submitted that the case ought not to be considered as having *sub silentio* overruled the English decisions."

It would seem more reasonable to hold that the courts of Scotland or England—though not bound to do so—may be justified in departing from their previous interpretation of the law so as to reflect the opinion of the House of Lords pronounced in an appeal originating from a different national jurisdiction. An obvious example was the acceptance of *Donoghue* v. *Stevenson* [8] by the English courts—a course which was particularly appropriate since that decision had been reached after an elaborate discussion of English precedents following on the questionable admission by counsel (who were not professionally qualified to make the admission)—that the principles of the Scottish law of *culpa* were identical with those of the English law of negligence. Professor Glanville Williams [9] put concisely what seems to be the correct view of such precedents from the viewpoint of an English lawyer: "A decision of the House on appeal from Scotland, if decided on the same principles as apply in English law, ought to be as good an authority as a decision of the House on appeal from England, *if the latter court* (*i.e.*, English court) *chooses to regard it as such.*" The courts in Scotland and England will, of course, always consider with respect a decision of the House of Lords which has dealt with a question which subsequently comes under consideration in a different jurisdiction.[10]

This doctrine of House of Lords precedents was powerfully reinforced by the opinions delivered in *Glasgow Corporation* v. *Central Land Board*.[11] Lord Simonds observed [12]: "What is the impact upon that (Scots) law of the decision in *Duncan's* case? At once it must be said that that decision was given upon an English appeal, in which the law of Scotland was not directly under review,

[6] iii, p. 1994, n. (*o*).
[7] (1862) 4 Macq. 314.
[8] 1932 S.C. (H.L.) 31; [1932] A.C. 562.
[9] *Sup. cit.*
[10] Gloag & Henderson, 5th ed., p. 11; *Doctrines of Judicial Precedent*, *sup. cit.*
[11] *Sup. cit.*
[12] At pp. 42–43.

that the common law of Scotland differs from that of England in regard to the liability of the Crown to be sued and has developed independently in regard to the right of discovery or recovery of documents in possession of the Crown, and that, desirable though it may be that in matters of constitutional importance the law of the two countries should not differ, yet it would be clearly improper for this House to treat the law of Scotland as finally determined by a decision upon an English appeal unless the case arose upon the interpretation of a statute common to both countries. . . . I come, then, to the conclusion upon this aspect of the case that the observations in *Duncan's* case must, so far as they relate to the law of Scotland, be regarded as *obiter dicta*. They are entitled to the more respectful consideration because two noble and learned Lords well versed in the law of Scotland concurred in them. But they are not decisive and, if, apart from them, your Lordships would come to a different conclusion, you are, in my opinion, well entitled to do so." Lord Normand[13] declared: "*Duncan's* case was an appeal from the English Court of Appeal and in it no question of Scots law fell to be decided. It is not binding on the Scottish courts nor, of course, on this House sitting as a court of ultimate appeal in a Scottish case. What was said in *Duncan's* case about the law of Scotland was said *obiter*, and, though it is not binding on the House, must receive the most respectful consideration." Lord Radcliffe, Lord Keith and Lord Somervell of Harrow also supported these views.

In conclusion, it is submitted with respect, Lord Simonds' *obiter dictum* that a case determined by the House of Lords in an English appeal upon the interpretation of a United Kingdom statute would be binding on a Scottish court may be doubted. The same objections apply to such a doctrine as to the view that alleged "general questions of jurisprudence" may be determined conclusively for Scottish and English law by the decision of the House of Lords in an appeal from one jurisdiction only. Very often, of course, the persuasive effect of the House of Lords decision interpreting a United Kingdom statute would be overwhelming in the jurisdiction indirectly affected—as it may indeed be on a point of general jurisprudence not based on statute.[14] There are, however, cases

[13] At p. 46.

[14] Mr. Anton has kindly suggested the relevance in this connection of *Assessor for Aberdeen* v. *James Collie*, 1932 S.C. 304. Here the Lands Valuation Appeal Court, though its decisions are not subject to review in the House of Lords, went so far as to depart from its previous interpretation of the Scottish Act to conform with the construction by the House of Lords of the equivalent English statute—*Finn* v. *Kerslake* [1931] A.C. 457. It may be observed, however, that Lord Hunter had dissented in the earlier Scottish case, and in *Collie's* case had gained powerful support for his own construction. It is thought that Lord Sands, who was in a flippant mood, overstates the situation when he regarded himself as "bound" by the decision in the English appeal. In *O'Hara* v. *H. M. Advocate*, 1948 J.C. 90, the High Court of Justiciary in

where latent specialties of Scottish and English law may not be apparent, and where it would be unjustifiable to preclude the possibility of further argument. The English lawyer is entitled to protection against distortion of English law by the indirect effect of a Scottish appeal. Likewise it would be unreasonable for Scottish law to be decided in a case where there might well have been no argument on Scottish law by Scottish counsel. The participation of a Scottish Lord of Appeal, which is not obligatory even in a Scottish appeal, cannot be regarded as the equivalent of argument from the Bar—as *Duncan* v. *Cammell Laird* [15] well illustrates. Thus, for example, a number of United Kingdom statutes make provisions regarding "infants" without defining the meaning of the word "infant." It has a technical significance in English law, which has no counterpart in Scottish law; and which does not correspond to the non-technical meaning of "infant" in ordinary language. It follows that a construction of such an Act in an appeal from the English courts would almost certainly not take into consideration the Scottish law—in particular on the point whether a minor (*a fortiori* a forisfamiliated minor) should be treated as an "infant," notwithstanding his considerable capacity to transact affairs. In Scotland a minor has wide powers to contract, to make a will of movables, to marry (if over sixteen years) without parental consent, and generally, when his father is dead, to choose his own place of residence. The expression "infant" in Scottish law either has no technical meaning in the absence of definition,[16] or it implies a child in pupillarity who has not yet reached puberty or minority.[17] An interpretation by the House of Lords based on the English meaning could surely not be regarded as binding the Scottish courts. It must, however, be conceded with regret that in an isolated case recently the House of Lords—departing from its usual practice—in interpreting United Kingdom income tax legislation has applied to the law of both countries the technical English meaning, rather than the popular meaning, of such expressions as "charity" or "charitable." [18] Examples could be multiplied, but what has been said may suffice to support the contention that even in questions of statutory interpretation the courts of Scotland and England should not be absolutely bound to follow the decisions of the House of Lords sitting as the final appellate court from the jurisdiction not

Scotland, which is not subject to the appellate jurisdiction of the House of Lords, expressly refused to follow the interpretation by the House of Lords in an English criminal appeal of the Criminal Evidence Act, 1898, s. 1 (f).

15 *Sup. cit.*

16 *Whitehead* v. *Philipps* (1902) 10 S.L.T. 577; *cf.* Sale of Goods Act, 1893, s. 2.

17 *i.e.*, the age of twelve in the case of females or fourteen in the case of males. Stair, I.5.2; Guardianship of Infants Act, 1886, s. 8.

18 See, *e.g.*, *I.R.C.* v. *Glasgow City Police Athletic Association*, 1953 S.C. (H.L.) 13; 1953 S.L.T. 105; [1953] A.C. 380, discussed (1953) 65 Jur.Rev. 121; (1953) 69 L.Q.R. 517; 1 Int. & Comp. Law Quarterly 402.

immediately affected. Nor, of course, should the House of Lords itself be bound by its own previous interpretation pronounced in an appeal originating from a different jurisdiction. The persuasive authority of such decisions will always be very considerable, but to regard them as absolutely binding would be to give undue weight to precedents which proceeded *ex parte* so far as the jurisdiction indirectly affected is concerned.

T. B. Smith.

Birtwhistle *v.* Vardill [1] Provincialism Again?

It would appear that the recent case of *Re Wilby deceased* [2] has proved the correctness of these words of Professor Goodrich in his *Conflict of Laws* [3]:—

"... it is questionable whether effect will be given in England to a foreign adoption."

The facts of the case were these: the deceased was born in 1924 to parents domiciled in Burma. In 1926 she was adopted by her uncle and aunt in accordance with the law of Burma. The adoption was effected by an agreement dated April 27, 1926, between the deceased's father (her mother was dead) and the uncle and aunt, whereby the father handed over the deceased to the latter and resigned to them his parental rights and duties, which they accepted. The agreement was duly registered on the same day, and there was no court order to confirm or approve it since, so it seems, none was necessary. The father, the deceased, the uncle and aunt were all domiciled in Burma at the date of this agreement and of its registration. In 1935, the deceased and her sister "joined their adoptive parents in England and became domiciled in England and so remained at all times thereafter." [4] The deceased died intestate in 1954, unmarried and without issue, and her adoptive mother applied by summons for a grant of letters of administration to the estate; the three brothers and sister of the deceased, having consented to the application, did not appear and were not represented.

Barnard J. refused the application after a careful consideration of *Re Wilson deceased* [5] and the suggestion therein of Vaisey J. that had the testator in that case

1 (1840) 7 Cl. & F. 895.
2 [1956] 2 W.L.R. 262; [1956] 1 All E.R. 27.
3 3rd ed., para. 145, p. 446.
4 [1956] 2 W.L.R. 262, at p. 263. These are the words of the statement of facts, and they appear to imply that the case is *sub silentio* authority for the proposition that an adopted child's domicile changes with that of the adopting parent: [1956] 1 All E.R. 27.
5 [1954] Ch. 733; [1954] 1 All E.R. 997; 3 I. & C.L.Q. 492.

> " been domiciled in Quebec at the time when the infant defendant was adopted, the case of the latter would have been different and very much stronger." [6]

Barnard J. concluded by stating that—

> " The adoption in this case would, no doubt, be recognised as valid in this country, for some purposes, but what I have to decide is whether it entitles the adoptive mother to succeed to the deceased's estate on an intestacy. If I were to accede to this summons, it would have to be on the basis that the English courts recognised any foreign adoption, provided that the adopter and the adopted were domiciled in the country where the adoption was completed, for the purpose of succession to property under English law. For it could not, in my view, be left to a judge to grant or refuse such an application as I have before me, according to how close the law of adoption in such foreign country approximated to our law of adoption. Such a task would be an impossible one as Vaisey J. points out in his judgment." [7]

We are, then, forced to admit that there exists another " arbitrary feudal rule "—that where English law governs an intestate succession, English law will alone determine (a) whether a child who has been adopted abroad can benefit under it, and, (b) whether the adoptive parents (or other " adoptive " relatives) of such a child can succeed on its intestacy. We are forced to acquiesce in this result in each case simply because the English Adoption Act, 1950, s. 13 (1) is a conflict of laws section as regards Northern Ireland but no further. It is to be hoped that this gap in our legislation will somehow be filled so as to remove this undesirable result so reminiscent of the (almost) bygone spectre of *Birtwhistle* v. *Vardill*.[8] In fairness, however, it must be admitted that on the facts of the two cases under review, the adoptive parents could have regularised the position since both they and the adopted children returned to England and could, without much trouble, have obtained adoption orders under English law.

It is true that in *Re Wilby* [9] the domicile of the adoptive parents and of the deceased had changed from Burma to England between the adoption and the death. It may well be thought that the following statement of an American judge disposes of the problem satisfactorily—

> " Rights of inheritance in property do not accrue until the death of the owner; and the rights of an adopted child to inherit cannot be fixed and determined when the adoption takes

[6] *Ibid.* at p. 744; at p. 1001.

[7] [1956] 2 W.L.R. 262, at pp. 265–266; [1956] 1 All E.R. 27, at p. 30.

[8] *Supra.* See, generally on adoption and this problem, Dicey, *Conflict of Laws*, 6th ed., rule 123 (2), pp. 512 *et seq.*; Cheshire, *Private International Law*, 4th ed., pp. 400 *et seq.*; Graveson, *Conflict of Laws*, 3rd ed., pp. 171 *et seq.*; Wolff, *Private International Law*, 2nd ed., pp. 398 *et seq.*; Mann, 57 L.Q.R. 112; Goodrich, *op. cit.*, pp. 446 *et seq.*; *Restatement*, paras. 143, 144; O'Connell, 33 Can.Bar.Rev. 635.

[9] *Supra.*

> place, for such rights may be changed, modified, or repealed by the legislature of the State. They are separate and distinct from the act of adoption. What an adopted child shall inherit is not ascertained by the law in force at the time of the adoption, but at the death of him from whom he seeks to take. The inheritable capacity of such child may, however, be changed at any time. Consequently, the rights of the adopted child to inherit property should be determined when and where inheritance is sought, in accordance with the ordinary rule. . ."[10]

It is submitted, however, that the approach of another U.S. court to the problem is the more desirable—

> "There is nothing in the policy of this State, in reference to the relation of parent and child, which could interfere with our giving effect to the Wisconsin decree, as respects the rights of the petitioners for the adoption, after they transferred their domicile to Connecticut, or of those claiming under them. *We have statutes of a similar nature, and fully recognise the status of an adopted child. Those who have once legally made such an adoption cannot shake off the relation by a change of domicile*"[11]

and that the English courts would do better to follow it in the future. It will at least remove the injustice apparent in *Re Wilby*.[12]

It is unobjectionable if the courts resist the solution of questions upon which they may not be fully competent to pass (for instance, in contract, whether the consideration is adequate). But it is respectfully suggested that it is entirely another matter so provincially to refuse almost point blank to examine the foreign law governing the adoptions as was done in *Re Wilson*[13] and *Re Wilby*[14] on the ground that the task would be an "impossible one." If an English court can classify a claim presented to it in the light of some foreign law and unknown both in substance and in form to English law[15]; if it can recognise a divorce granted by the domiciliary courts for a ground not recognised by English law[16]; if it can recognise a divorce granted by a court which is not that of the parties' domicile but which assumes jurisdiction under some statute substantially similar to its own under section 18 (1) (*a*)[17] of the Matrimonial Causes Act, 1950; if it can regard a person as

[10] *Anderson* v. *French* (1915) 77 N.H. 509 (Supreme Court, New Hampshire) *per* Plummer J.

[11] Italics supplied: *Woodward's Appeal* (1908) 81 Conn. 152, *per* Hamersley J. (Supreme Court of Errors, Connecticut).

[12] *Supra.*

[13] *Supra.*

[14] *Supra.*

[15] *Batthyani* v. *Walford* (1887) 36 Ch.D. 269, C.A. (claim for deterioration and dilapidation of estates during lifetime of tenant for life under Austro-Hungarian Fidei Commiss brought against his estate by his successor in title held to be quasi-contractual in nature).

[16] *Pemberton* v. *Hughes* [1899] 1 Ch. 781 (violent temper).

[17] *Travers* v. *Holley* [1953] P. 246.

legitimated under some foreign law even though English law contains no provision of its own as to legitimation,[18] it surely ought not to be too much to ask that an English court should compare foreign adoption laws with its own. It is thought that if the law of the domicile of the adoptive parents and that of the adopted child are both substantially the same as the English law, and if both place the adopted child for the purposes of inheritance and succession in the same position as if he were a legitimate child of the adopting parents, there seems to be no adequate reason why an English court should not be prepared to allow the adoptive parents and the adopted child to succeed under each other's intestacy even though such intestacy may be governed by English law. This suggestion should, of course, be subject to the proviso that English notions of public policy are not contravened. For instance, an adoption abroad of someone who is over the age of twenty-one need not be recognised here, nor an East Asian adoption where the main function and motive is to maintain ancestor worship, nor where the difference in age between the adoptive parent and the adopted child is substantially smaller than the twenty-one years' difference required by English law, nor where the foreign law does not regard the welfare of the child as being paramount.

P. R. H. WEBB.

NOTE: A report of the case of *British and Irish Steampacket Co. Ltd.* v. *Branigan* (noted 19 M.L.R. 311) is published in *Lloyd's List Shipping Gazette*, March 18, 1956.

[18] *Re Goodman* (1881) 17 Ch.D. 266. This is not to say that it is possible to analogise between legitimation and adoption.

BOOK REVIEWS

20TH CENTURY LEGAL PHILOSOPHY SERIES. Volume VII: LAW AND MORALITY. By LEON PETRAZYCKI, translated by HUGH W. BABB, with an Introduction by NICHOLAS S. TIMASHEFF. [Harvard University Press; London: Geoffrey Cumberlege. xlvi and 335 pp. 60s. net.]

LEON Petrażycki (the Russian spelling "Petrazhitsky" better indicates the pronunciation to the English reader) was born in 1867 (according to Professor Timasheff; in 1864 according to Professor Meyendorff in *Modern Theories of Law*) in the Russian province of Vitebsk, once part of Poland. He belonged to the country gentry, whose culture and religion were predominantly Polish and Catholic. A brilliant student, he was chosen by the Russian Ministry of Education for membership of the special seminar which it had created in Berlin, under Dernburg, for Russian "professorial aspirants." This brought him into contact with the jurists then drafting the German Civil Code and, apparently, he began to feel some philosophical dissatisfaction with their narrowly historical-positivist outlook. His own early publications, however, up to his appointment in 1898 to the Chair of Legal Encyclopaedia at St. Petersburg, were on topics of the positive civil law. It was round about 1900 that his original ideas began to appear in print and became in Russia a focus of controversy which lasted up to the First World War. After the peace treaty of 1921, availing himself of the option granted to persons of Polish descent, he emigrated to the reconstituted State of Poland, where he became Professor at Warsaw. In 1931 he put an end to his own life.

The present volume contains a translation (abbreviated, for Petrażycki was a copious and repetitive writer) of the two major works of his most fertile period, namely, *Introduction to the Study of Law and Morality* (2nd edition, 1907) and *Theory of Law and the State* (2nd edition, 1910). Probably all his most significant ideas are to be found in it.

According to Petrażycki the "deplorable and chaotic condition" of contemporary legal science was due to the blunder of jurists in trying to discuss legal concepts without having a truly "scientific" concept of law itself. Take such legal propositions as "The lessee B is under obligation to pay 500 roubles rent to the lessor A," or "The Treasury owns the forest of X; all persons are bound to refrain from cutting wood therein." Naive realism looks for material objects to correspond to the concepts involved. Naive nihilism, finding that "a right" and "an obligation" have no visible, tangible existence, denies that such propositions have any meaning. Naive speculation attempts to give them meaning by constructing imaginary objects—norms, rights, obligations, ownership, the Treasury, "everyone at large." These lines of thought are all mistaken. Although such propositions do not correspond to anything in the material world, yet they do describe real phenomena, namely, experiences in the mind of the person who formulates them. Legal phenomena are psychic processes. The reality of law is psychological. Others had anticipated this idea, but Petrażycki set himself to work it out systematically. What he sought to construct was in no way an idealist philosophy but an empiric science founded on observation. We gain knowledge of psychic phenomena directly through internal perception of what goes on in our own mind, and, as we observe that our own mental processes cause external movements (gesture, speech, writing, etc.), we can, with due precautions, infer that similar movements observed in others correspond to similar processes in their minds. Thus we can have an objective science of psychology.

Petrażycki's contributions to psychology, striking and controversial in his own day, are now largely accepted or superseded. To the recognised categories of mental processes he added what he called "impulsions," that is, complex bilateral experiences in which passive elements (cognitive and emotional) are combined with active (volitional). The ethical impulsion, or experience of duty, is one of these. Many of our ethical impulsions bid us do something for another person, for instance, to give alms to a poor man. Some of them, however, go farther and furnish us with the idea that we "owe" something to another; they attribute to him a "claim" on us; they are not merely imperative but imperative-attributive. These last are *legal* impulsions and it is with them that legal science is or should be concerned.

The province of jurisprudence being thus psychologically determined, Petrażycki went on to map it out on "scientific" lines, distinguishing "intuitive law" (independent and autonomous opinions) from "positive law" (heteronomous opinions defined by various objective facts and producing a pattern of norms uniform for masses of people), and further dividing positive law into "unofficial positive law" and "official positive law" or the law of the State. Within this framework he examined the particular concepts which are used in legal thinking.

Our English legal historians tell us that in the long run the effect of the Statute of Uses was merely to add three words to every conveyance, and in some parts of Petrażycki's discussion it might seem that the effect of his psychological discoveries is merely to add two words to each of our familiar terms: "rights," "obligations," "normative facts," "relevant facts" and so on reappear as "ideas of rights," "ideas of obligations," "ideas of normative facts," "ideas of relevant facts" and so on. This, however, would be a superficial criticism. One of the main difficulties of twentieth-century jurisprudence is that, while most writers now agree that such phenomena as international law, customary law, the autonomous internal rules of organisations and societies, and perhaps even the rules of public opinion may in some sense partake in the nature of law, we have no agreed criterion of what is "law" in this wide non-Austinian sense. Petrażycki does at least offer us a unifying concept by which we can bring all "legal" phenomena into the same science and study them on the same basis. Children in the nursery can have towards each other "impulsions" of a legal nature, recognising rights which they feel ought to be respected and claims which ought to be enforced. A man can have impulsions which attribute duties to animals or rights to idols, and in some societies such impulsions have been generally shared and publicly sanctioned. It is no small gain to be able to recognise the nature of such impulsions and distinguish them from sentiments of affection or impulses of pure ethical duty. It is no small gain to be freed from sterile debate whether there is something, and if so, what, in the nature of animals or idols or associations "in themselves" which renders them apt, or inapt, to be subjects of legal rights. And incidentally Petrażycki's point of view gives him many new and illuminating observations on the social functions of law and the characteristics, tendencies and mutual interactions of the species of law which he has distinguished.

It would be interesting, though not particularly profitable (save perhaps for the earning of a Ph.D.) to trace similarities between Petrażycki's thought and that of his predecessors, contemporaries and successors. The present reviewer, without any attempt at research, has noted the following points. Petrażycki's opening insistence on scientific method based on observation external and internal can be paralleled in such nineteenth-century *Naturrechtslehrer* as Krause, Ahrens, Lorimer, although the sort of theory they built was very different. The influence, by attraction or repulsion, of Ihering is apparent in several places. The "imperative-*attributive*" character of the legal impulsion in Petrażycki is perhaps the same thing, from a different point of view, as the *alteritas* (the consciousness of the Other as a subject)

which Del Vecchio picked as the distinguishing mark of "juridical" justice. The inclusion of "unofficial law" within the juristic horizon recalls the importance attached by Ehrlich and the sociologists to the study of the "living law," and, as Professor Timasheff points out, Petrażycki might have found something congenial in the American realists, though he would certainly have criticised them for undue concentration on the "official law" of the courts. Kelsenians will be interested to find (pp. 298–299) an attack, though not conducted on Kelsenian lines, on the distinction between public and private law; for Petrażycki the distinction, though he admits it, is one of comparatively trivial importance. The law of the nursery (pp. 68–71 of this volume) plays a great part in Bienenfeld. And most striking of all is the parallelism between Petrażycki's whole theory and the psychological theories of law developed, though with less attention to "unofficial law," by the Scandinavians under the inspiration of Hägerström, an almost exact contemporary of Petrażycki. Yet there is no evidence that Petrażycki knew of Hägerström (whose main writings were much later than his own) or that Hägerström could read Russian.

Such comparative study, save as regards the predecessors whose work may have been known to Petrażycki, would probably reveal little or no direct contact of minds. Petrażycki's work remained untranslated and little known outside Russia, where since the revolution it has of course been rejected. The editors of the *Twentieth Century Legal Philosophy Series*, together with Professor Babb and Professor Timasheff, have done an inestimable service in making it accessible in English. Although it may now in some points be outmoded or superseded it is a great achievement of thought. Unfortunately it is not a great achievement of literary style. Even his devoted translator is driven to complain of Petrażycki's "not particularly good Russian," his idiosyncrasies of terminology and his "almost incredibly repetitive prolixity." And with reason. Here is a sample from p. 238. The thought appears to be: *Lawyers tend to see everything in legal terms.* As expounded by Petrażycki it becomes, in faithful translation:

> Analogous processes, whereby the intuitive law is derived from the positive law, consist in legal experiences suggested by the normative facts of positive law (and originally dependent on ideas of these facts) which thereafter—and especially if they are repeated frequently and acquire impulsive vitality—take on an independent character, and appear *qua* intuitive law independently of the corresponding normative facts and ideas thereof. This occurs through the formation of stable dispositive associations of the corresponding object ideas and imperative-attributive impulsions. By the action of these processes, the intuitive law mentality of those who are specially and constantly concerned with positive law —such as learned specialists, judges, attorneys and so forth—is subjected incidentally to a specific regeneration and develops unilaterally in that the positive law which these specialists constantly study, expound as professors, or apply—which, in other words, they experience frequently so that it leaves corresponding dispositive traces—becomes to a significant degree their intuitive law, crowding out and destroying various elements of their former intuitive law. Then, their intuitive law consciousness acquires to a considerable degree a complexion other than that of the intuitive law consciousness of non-specialists and this is sometimes a source of mutual misunderstanding and controversy.

After wading through three hundred and thirty pages of this gobbledygook one experiences a certain fatigue.

A. H. Campbell.

Prediction Methods in Relation to Borstal Training. Studies in the Causes of Delinquency and the Treatment of Offenders. I. By Hermann Mannheim and Leslie T. Wilkins. With a

Foreword by Sir Frank Newsam. [London: Her Majesty's Stationery Office. 1955. viii and 276 pp. 17s. 6d.]

Modern criminology has accumulated a growing amount of empirical evidence on personal characteristics of offenders, their social background and their careers both before and after penal and corrective treatment. Like an experiment *ex post,* this experience of past cases under different treatment ought to be used as a pointer to the probable outcome of other similar cases after a corresponding form of treatment. In the United States, studies on the after-careers of former probationers and discharged prisoners have provided a basis for an empirical prognosis of the further crime risk of various types of offenders. By refined statistical methods, these considerations have been developed into a scientific device of "crime prediction" and the design of prediction tables in analogy to tables of life expectancy as they are used for the purpose of life insurance. As Sir Frank Newsam points out in the preface to the present book, the creation of reliable prognostic instruments would be a valuable achievement for the science of criminology as well as for practical purposes of the administration of criminal justice. So far, research on these lines has been very much the work of Professor and Mrs. Glueck of Harvard who, in their classical studies, followed up the after-careers of offenders through several consecutive periods. They then weighted a number of factors according to their more or less frequent association with the commission of new offences, gave this relationship a numerical expression, and divided the span between the highest and the lowest total which an offender could score on the strength of certain characteristic symptoms, into different risk groups with a higher or lower probability of a relapse into crime. In this country research on these lines began with Borstal boys. Gordon Rose, in his *Five Hundred Borstal Boys,* 1954, first used these methods and presented comprehensive evidence on the relation of certain factors, especially work habits, observed before, during and after the institutional treatment, to the boys' conduct, without proceeding on the strength of this experience to the prediction of the future behaviour of new cases. In the present study a leading criminologist and an eminent statistician develop their "experience tables" into an instrument of crime prediction and validate their prediction methods, based on past experience, by predicting the outcome of more recent cases and comparing their prognosis with the boys' actual success and failure. This book is the first of a series of Home Office publications of Studies in the Causes and Treatment of Offenders, a fruit of section 77 of the Criminal Justice Act, 1948, which authorises the allocation of Treasury money to criminological research.

The present study is based on relevant data in respect of 700 boys who entered Borstal institutions between September 1, 1946, and July 31, 1947. The criterion for failure or success was reconviction, or absence of reconviction, up to August 31, 1951, which means an average follow-up period of three and a half years. The discussion of the available evidence reveals certain facts of general criminological interest. Twenty-two per cent. of the Borstal boys came from a "broken home," that is a home from which one of the parents is absent, against 14 per cent. in the general adolescent population. The difference is even larger in respect of those who are not living with either parent; 27 per cent. of the Borstal boys against 7 per cent. of the corresponding control group (86). However, the mere fact of a broken home does not increase the risk of failure after release from Borstal training (87). It appears that boys who have numerous offences taken into consideration are clever boys who for a while avoid being detected and prosecuted, and for this very reason have a low reconviction rate (88). About two-thirds of the number of boys committed disciplinary offences while they were in Borstal, and less than one-third absconded once or more, but only six out of 208 absconders committed criminal offences during their brief spell of freedom (116). When the discussion proceeds from single factors to more or

less comprehensive configurations we learn that it is not always the accumulation of bad points, but sometimes a "conflict situation" which gives the worst prognosis. A boy of more than average intelligence in a labouring job whose father is employed in work of a higher social standard, has less favourable prospects of adjustment than a boy whose intelligence and occupation are in line with each other, and whose father is employed in a job of the same social status, even if these jobs and his intelligence are not rated very high (155).

Instructive as these observations are, the main purpose of the book is to use such criminological experience for the construction of a reliable instrument of prediction. The factors finally selected for prediction and the weights in the direction of probable failure attributed to the presence of each factor and expressed in a score figure are tabulated at p. 145. For the mathematician, the method applied for the calculation of these score figures is discussed in Appendix II, pp. 237–239. Factors selected for the indication of a probable failure refer to previous experience of penal and corrective treatment, lack of a parental home, residence in an industrial area, the shortness of the longest period in any one job, and drunkenness. The last-mentioned factor, although prevalent only in thirty-two cases out of nearly 700 boys, far surpasses by its weight every other factor and is equal to one half the weight of the worst possible combination of all the other failure factors together. Indeed, only three out of the thirty-two drunkards succeeded in avoiding reconviction (79). For 385 of the boys sufficient data were available to work out totals of the predictive scores. According to the total scores attained these cases were divided into five risk groups. Out of the fifty-four boys with the lowest failure score, forty-seven turned out to be successes, while of the sixteen boys in the highest risk group, fourteen proved to be failures (146).

With due acknowledgment to the pioneer work of the Gluecks this English prediction study breaks much new ground. Most rigid standards are applied to the objectivity and reproducibility of any factor, so that the collection and assessment of data is independent of the personal judgment of the individual observers. Regard is paid to the possible amount of overlapping between different factors. So far, prediction methods worked satisfactorily in forecasting extreme cases of either very high or very low probability of success or failure but left a considerable middle group where the chances for good or for evil were almost equal. The authors attack this "unpredictable" middle group by calculating a second predictive scheme with different factors, mostly of a personal character, by which this group can be split into cases with a certain prospect of success and those with a probability of failure (154). Mannheim and Wilkins' prediction tables indicate not only the probability but also the degree of success and failure in terms of length of time without further commission of a crime and the number of crimes committed in a given period (152). The classification of Borstal boys into specified risk groups makes it possible to demonstrate how much the better results of training in open institutions are due to a positive selection of boys allocated to open treatment, and how much to the superiority of an open régime as an opportunity for training. In fact, boys of all risk groups had a higher success rate after training in open institutions than their equally burdened contemporaries in closed institutions.

Prediction on these lines proved three times as efficient as a prognosis based on the subjective judgment of the Governor (141). For the final test a validation was made by applying the prediction derived from the after-careers of the 1946–1947 vintage to a more recent group of Borstal entrants from July to December, 1948. In the combined low and very low risk groups 75 per cent. were predicted as successes and exactly 75 per cent. remained free from reconviction, while in the combined high and very high risk groups no more than 31 per cent. were predicted as successes and actually 29 per cent. did not commit further offences. The authors can rightly claim that there was no difference between the predicted risk rate and

the actual proportion of successes and failures in a more recent group of Borstal boys (163).

The decisive question implied in this serious and painstaking research is this: what is the aim to which that formidable scientific effort will ultimately lead? The answer to this question is a controversial subject in present-day criminological discussion. Prediction, like the common-sense judgment of the experienced practitioner, is the expression of an estimated risk, but a probability based on objective data and expressed in numerical terms. The concept of probability implies the comparison of an individual with observations made on a group. An 80 per cent. crime risk means that the individual concerned has certain relevant factors in common with a group of a hundred people of whom eighty became criminals and twenty remained law-abiding citizens. The question whether the individual belongs to the eighty who fail or to the twenty who succeed remains open. Prediction, therefore, answers the first preliminary question only. It helps sentencing courts, allocation committees and parole boards to realise "what they are doing," *i.e.*, to be aware of the risk they are incurring. There remains still the final question what penal or corrective treatment in the face of a certain risk should be awarded to the individual offender. In the long-drawn process of social readjustment, the mere absence of a reconviction is not always identical with success. Prospects of a lasting improvement sometimes involve a high risk of a relapse. The court may feel justified in making the experiment of assigning an offender to a probation officer who is expected to exert a personal influence on the particular probationer, or it may commit the offender to an institution where new treatment methods are being tried. The court must come to a decision even if the offender has a high failure score on all admissible modes of treatment. In the ultimate decision no mathematical formula can replace the personal responsibility of the sentencing court.

Neither the present authors nor any other ardent worker in this field would contest these inherent limitations of crime prediction. However, the sheer weight of the rigid concentration on objective data and of the final expression of the results in a mathematical formula can induce the student of criminology to identify the selection of appropriate treatment with the classification into specific risk groups. A recognition of this danger should not lead to the indignant rejection of a further step in the direction of an over-rationalisation of human relationships, but to an extension of research into the personal judgments which support individual decisions. Thus the balance would be restored between an objective classification into risk groups and the divers considerations which lead to the decision determining the fate of an individual offender.

Mannheim and Wilkins' book is not, and is not intended to be, a manual for sentencing courts, but an accurate report of an intricate piece of research, an indispensable foundation for any further endeavour to apply not only statistical methods, but also the underlying philosophy of statistics, to the study of human behaviour.

M. GRUNHUT.

NEW ZEALAND: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION. Under the general editorship of J. L. ROBSON, LL.M., PH.D. [London: Stevens & Sons, Ltd. 1954. xix and 384 pp. £2 10s. net.]

THIS volume is an excellent addition to the most valuable series of treatises on the laws of the British Commonwealth which Professor Keeton launched some years ago. Mr. J. L. Robson, an Assistant Secretary at the Department of Justice, Wellington, has not only acted as general editor for the volume; he has also written most of it himself. He has, however, had the valuable

assistance of two other civil servants, Mr. Bain and Mr. Haughey; and of two teachers of law and political science, Professor Campbell and Mr. Scott.

Of all the British-settled members of the British Commonwealth of Nations New Zealand is closest in outlook, tradition and institutions to the mother country, though farthest in physical distance. It is closer even than Australia, largely because the latter has a Federal system. Nobody who has lived under both unitary and Federal systems can fail to be impressed by the deep effects of the constitutional structure on the role of the courts and the place of law in the body politic.

New Zealand, like Canada, and unlike Australia and South Africa, does not have a Constitution enacted by an independent New Zealand Constituent Assembly, but has a Constitution Act, originally enacted in 1852 by the British Parliament. The constitutional significance of this Act has, of course, altered radically, as New Zealand has grown from the status of a relatively autonomous colony to a full and independent Dominion within the British Commonwealth of Nations. But the basic constitutional statute is still the same. The introductory chapter by Mr. Robson and Mr. Scott traces the development up to the present. One by one the constitutional limitations and reservations have disappeared, so that the New Zealand Legislature and Government developed correspondingly into fully independent organs. The only major constitutional change enacted by an independent New Zealand has been the abolition of the Legislative Council. In 1947 the United Kingdom Parliament, in accordance with a request following a New Zealand Act, gave the New Zealand Parliament formal power to alter, suspend or repeal all or any of the provisions of the Constitution Act. Another move towards greater legal independence has been the introduction of a New Zealand citizenship similar to the changes that took place in the other members of the Commonwealth, including the United Kingdom itself. All this has hardly affected the closeness of the links between New Zealand and the mother country.

Broadly speaking it remains true that in all fields of the traditional common law New Zealand still closely follows the English model. This is underlined by the fact that the New Zealand courts in matters of common law still consider themselves bound to follow the decisions of the superior courts of the United Kingdom. The affinity is closest in tort and contract. Indeed, two famous textbooks on these two old common law subjects have been written by the late Sir John Salmond, sometime a judge of the Supreme Court of New Zealand, and one of the outstanding figures in the legal history of the British Commonwealth. In the field of real property New Zealand, like Australia and Canada, has departed from the English tradition by introducing the Torrens system of land transfer. In the field of the common law New Zealand generally follows reforms of the English law. A recent example is the Crown Proceedings Act, 1950, which is modelled upon the English Act of 1947. In the field of criminal law, too, New Zealand still follows close in the English tradition. It has, however, like Canada, codified most of its criminal law in the Criminal Code Act, 1893. As regards the interpretation of general principles of criminal liability, however, Professor Campbell is of the opinion that New Zealand has not notably contributed to its development.

Like other Dominions, New Zealand has shown the greatest degree of independence and autonomous development in more modern branches of the law, *i.e.*, in the field of public rather than private law. For decades New Zealand's social legislation has served as a model to many countries all over the world, at least to all those—and it is a great majority—that have accepted the philosophy of the Social Welfare State. In 1872 the first comprehensive measure dealing with public health was passed. In 1877 the principle of free secular and compulsory education was introduced. In 1898 New Zealand passed pioneer legislation, introducing an old age pension scheme.

The extraordinary dependence of New Zealand on its agriculture, and in

particular on its meat and dairy farming industries, led from the First World War onwards to extensive marketing legislation and marketing organisation. New Zealand is very close to Australia, and different from any other country, in the legal structure of its law of labour and industrial relations. Both countries have a comprehensive conciliation and arbitration system, culminating in a Court of Arbitration, which is in effect a legislative body, though it makes law in the form of awards. The New Zealand court, like the Australian court, is a court of three judges, which makes compulsory awards extending to and binding every trade union, industrial union, industrial association or employer connected with or engaged in the industry to which the award applies, within the industrial district to which the award relates. In this both Australia and New Zealand differ radically from England, where the role of the State and of the courts in the regulation of labour conditions is far more restricted, and the role of autonomous bargaining correspondingly stronger. As in Australia, it has proved difficult in New Zealand to make the theoretical prohibition of strikes after a binding award by the Arbitration Court effective.

In the Commercial Trusts Act, 1910, New Zealand had an interesting piece of anti-monopoly legislation, somewhat modelled upon the American Sherman Act. The effectiveness of this Act was probably destroyed for good in the celebrated case of *The King* v. *Crown Milling Co., Ltd.*, which went to the Privy Council in 1927.[1] The question at issue was whether a company formed for the purpose of acting as sole selling agent, on a commission basis, for mill owners, with a partial monopoly of the supply of flour and control over prices of flour in part of New Zealand, offended against the Act. The New Zealand courts were deeply divided on the issue of the "public interest." The Privy Council sided with those who held this part monopoly not to be against the public interest. The decision is famous above all for a much debated exercise in judicial self-deception: "It is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy" (*per* Lord Finlay). Having delivered itself of this opinion the Privy Council proceeded to take sides in a conflict of political and economic theory, by holding that it was for the prosecution to establish in each particular case whether a monopoly was contrary to the public interest and that the Crown had not discharged the burden of proof in this case.

Mr. Robson and his collaborators are to be congratulated on a most valuable and lucidly written treatise on the law of a small but highly civilised and progressive member of the Commonwealth.

W. Friedmann.

Law and Politics in the World Community. Edited by G. A. Lipsky. [Berkeley: University of California Press; London: Cambridge University Press. 1954. xx and 373 pp. 45s.]

This volume of essays is intended as a tribute to Kelsen, who is described by Dr. Hambro as "probably [having] done more to encourage clear thinking in the international law profession than any other writer in this generation" (p. 245), and his pure theory of law "which provides a method of determining the content of positive international law, of testing its validity, and of defining the area of its operation. [It is] a theory of positive law, not a speculation of the just law" (p. xiii). The tone of the essays is set by this concept which looks upon law as a science unaffected by attendant reasons, values, and the like.

Perhaps not all the contributors to the volume are Kelsenians, but all have attempted to see specific problems of international law against the background

[1] *Crown Milling Co.* v. *The King* [1927] A.C. 394.

of the pure theory, while some of them have allowed their participation in a "Festschrift" for the founder of the Viennese school to frame their comments in the involved form often attached to Kelsen's own writings. Professor Scelle, discussing "Some Reflections on Juridical Personality in International Law," comments that "The same technique which makes of the legal order of a state a normative order superior to all internal orders, is roughly hewn in the international oecumenical society and by a series of federative stages, of successive normative stratifications results in a supreme normative order to which alone one would think of applying the qualification of sovereignty. . . . The legal technique is *one* in the indefinite *pluralism* of collectivities" (p. 55). The use of Kelsenian language in an unnecessary manner is perhaps clearest in Professor Kunz's study of "The Geneva Conventions of 1949." Professor Kunz states that at the time of writing his paper, 1951, the only analysis in English of these Conventions was Miss Gutteridge's article in the 1949 *British Yearbook of International Law.* This is to do Miss Gutteridge an injustice, for she also published an analysis of the "Civilians Convention" in the 1951 *Yearbook of World Affairs.* In his essay Professor Kunz virtually "out-Kelsens" Kelsen. Whenever he wishes to refer to a rule or an article of the Geneva Conventions he talks of "norms": "The fact that women are nowadays enrolled in the armed forces is reflected in norms generally mentioning women" (p. 296).

Two or three of the contributions deal with aspects of the United Nations, but before looking at them it is as well to draw attention to some of Professor Wright's comments on "Law and Politics in the World Community." He reminds us that no society can exist without both a system of law and a system of politics, and that social stability depends upon the relationship between the two. "What is needed is a balance between law and politics in the world. Law must be corrected and kept up to date by politics and politics must be regulated by law" (p. 13). With this in mind one can compare Professor Eagleton's paper on "The United Nations: A Legal Order?" with Professor Morgenthau's "Political Limitations of the United Nations." The former is concerned with the lack of a legal sense in the Charter which is based on "sovereign equality not on law" (p. 136)—but sovereign equality has no meaning outside of legal thought. He deplores the political nature of the decisions made by the United Nations, but this is to ignore the fact that the World Court has described the United Nations as a political body making political decisions for political reasons. Professor Morgenthau, on the other hand, contends that there is too much tendency today to "look at the legal provisions of the Charter and the institutions derived from them as though they were self-sufficient entities which receive their political meaning and their ability to perform political functions from their own literal content without reference to the political environment within and with regard to which they are supposed to operate" (p. 143). He also suggests that the history of the League of Nations would have been no different had the United States became a member, for he considers that American policy would have been just the same from 1919 to 1939, and that those who blame the United States and its non-membership for the failure of the League are merely seeking an alibi for their own shortcomings (p. 149).

Of the other articles on the United Nations it is sufficient to mention that Mr. Starke considers that the present enthusiasm for regionalism is based less on a true appreciation of the needs of the moment than on a desire to follow current fashion (p. 115). Professor Verdross examines the extent to which general international law has survived the establishment of the United Nations. At the present time, when there is so much discussion on Charter revision, it is interesting to see his suggestion that the Charter, and especially Article 27, paragraph 3, the veto article, might be amended other than by the processes established by the Charter, but by way of desuetude (p. 161). Unfortunately he gives no indication how this would ensue, for this he considers beyond the scope of his paper.

Among the remaining papers is one of an historical character by Professor Nussbaum. His study of "Forms and Observances of Treaties in the Middle Ages and the Early Sixteenth Century" is full of interesting curiosa on the oaths which during those years were taken as evidence of the solemnity and binding character of treaties. In direct contrast is Professor Oliver's "Thoughts on Two Recent Events Affecting the Function of Law in the International Community." Despite the title, there is no similarity to Sir Hersch Lauterpacht's famous book. Instead, the learned author has appeared to use Kelsen as the rod with which to beat George Kennan and his views on American diplomacy.

In his paper on "What is Positive International Law?" Professor Guggenheim condemns sociological jurisprudence which "reduces the meaning of a legal obligation to the statement that in the consideration of certain human behaviour—contradictory to the will of those wielding power—the one or the other consequence will probably follow. . . . To disregard the qualification presented by the normative theory of such a behaviour as an illegal act, leads necessarily to the identification of the validity of the law with the *efficacy* of the commands given by the ruler. In this way, however, the specific meaning of the law is abandoned" (p. 26). At the end of his paper he concludes that "positive international law is by necessity secularised, religiously neutral law, in view of the manifold religious and ethical legal communities which constitute the society of nations. All attempts to dissolve its secular character and to replace it with a legal order conforming to a *fixed* religious ideal are therefore directed against the stability of the valid and effective legal order" (p. 30).

Professor Lauterpacht's essay contemplates "Rules of Warfare in an Undeclared War," but "while the principle here advanced—the principle of the invalidity of title acquired by the belligerent waging an unlawful war—seems consistent with and prompted by cogent legal considerations, it has not become part of the practice of courts [even less has it become part of the practice of States]. To that extent the reader must be warned that what is here represented as a correct principle of law is so, at present, substantially *de lege ferenda* only" (p. 107). For this reason, there is no need to examine in detail the contentions brought forward to show that, even, or especially, in war "an unlawful act ought not to become a source of benefit and title to the wrongdoer" (p. 113). It suffices to agree with the former Whewell Professor that "the phenomenon of war does not fully admit of treatment in accordance with canons of legal logic. [Even if it were true to say that it has been] banished as a legal institution, it remains an event calling for legal regulation for the sake of humanity, of the dignity of man, and of safeguarding the possibility of some measure of reconciliation between the belligerents after the war" (p. 113).

In a review it is difficult to do more than notice the most significant papers in a symposium. Others can merely be named. Thus, in this collection Professor Tucker has considered "The Principle of Effectiveness in International Law"; Professor Gross "States as Organs of International Law and the Problem of Autointerpretation"; Professor Hula "International Law and the Protection of Human Rights"; Professor Brandweiner "The International Status of Austria"; and Dr. Freeman "The Political Powers of the OAS Council." All the papers in the collection have something of interest to say, although at times it is difficult to see the exact relationship between the paper and Kelsen, while the language and style are often somewhat abstruse. From the purely formal point of view, the absence of an index is to be regretted. Further, the printing of the footnotes to all the papers at the end of the volume without any indication of the essay to which the references relate, other than the breaking of the continuity by the mere name of the contributor, but with no indication of the title of his paper, hardly contributes to the usefulness of the volume.

L. C. GREEN.

THE UNIVERSITY TEACHING OF SOCIAL SCIENCES: LAW. Report prepared by CHARLES EISENMANN, Professor at the University of Paris, for the International Committee of Comparative Law. [UNESCO; translated from the French. 133 pp. 6s.]

UNESCO has already published a series of *national* reports on the teaching of the Social Sciences, and in (1955) 18 M.L.R. at p. 535 we reviewed the report on the *United Kingdom*. These national reports have provided material for a series of *general* reports, and the booklet now under review is the report on the University teaching of *Law*. The material has been provided by rapporteurs from Egypt, the United States, France, the United Kingdom, India, Mexico, Sweden, Jugoslavia, the German Federal Republic, Belgium and Lebanon, under the direction of the International Committee of Comparative Law, and the editorial work has been in the hands of Professor Charles Eisenmann assisted by Professor John N. Hazard. Appendix I contains the conclusions of the Symposium on the Teaching of Law held at Cambridge in July, 1952.

The first part of the book comprises a general discussion of the aims of legal education. The main choice is between purely practical or professional ends, and a combination of these with theoretical or scientific purposes. A third choice is possible, *viz.*, purely theoretical or scientific ends, but this may be ruled out as not meeting the needs of the bulk of law students. Practical law teaching will emphasise the importance of legal reasoning, though it may pursue the comparative method to a limited extent and even include a study of Roman Law. The scientific teaching of law is not content with the factual analysis of a legal system: it wants to enunciate legal dogma, to understand what the law is in itself. Ideally it would embrace all legal systems in all times and all places, although actually it must curb its ambitions. The practical approach to the study of law tends to emphasise the application of law in cases, while the scientific approach emphasises the problems of legislation. The legal scientist sees law as part of a wider social reality: his work will tend to be comparative and critical. The question is, which approach corresponds better to the idea of higher or University education? Professor Eisenmann comes down unhesitatingly on the side of "scientific" teaching, blended (as we have seen it must be) with some professional technique. "Teaching for purely practical purposes," he says at p. 56, "is not university teaching in the true sense." Purely practical teaching in law would, indeed, have less intellectual value than instruction in the techniques of applied science without any pure science or theory, for the laws of a given country at a given time, considered from this narrow standpoint, appear "artificial, purely contingent, arbitrary, and unrooted in reality." The distinction between methods of study is more important than that between the subjects studied.

The second part of the book describes the way in which the main problems of organising a system of legal studies are tackled—"solved" is perhaps too strong a word—in each of the countries surveyed. The "institutional framework" comes first, covering the various types of institution for advanced legal training, the teaching staff and the conditions for admission. Then come teaching and studies, under which are considered the social function of faculties or schools of law, the principal cycles of studies provided, teaching methods, and the examination system.

The most valuable section is that on teaching methods. The first classification gives the active or bilateral method, the passive or unilateral method, and a combination of these. India is the only one of the countries surveyed which uses the purely passive method. (Something might perhaps have been said here about the Indian habit of learning by heart.) In most of the other countries, except for the tutorial system at Oxford and Cambridge and the American case method, the lecture system predominates. The next

distinction is that between systematic and empirical presentation. The often-misunderstood American case method is empirical, while the other countries —even English law schools when they think they are using the case method— employ the systematic method. The two classifications are not identical. Thus Polonius may choose for his method of instruction the active-systematic, the active-empirical, the passive-systematic or the passive-empirical.

The main topics concerning examinations are: how far should they be written or oral, and how far should the questions be abstract or concrete? In most Universities examinations are exclusively or predominantly written, but in Jugoslavia and Mexico they are purely oral. A balance between concrete and theoretical questions seems to be both usual and desirable. In the United States, however, an examination is sometimes merely a method of grading candidates who are already assumed to be qualified to pass. In such examinations the candidate may be asked which of several solutions given is the correct one. It would be instructive to find out how the average chimpanzee would fare in a question like this.

As we said in our review of the UNESCO booklet on *The Teaching of the Social Sciences in the United Kingdom*, "the difficulty inherent in the attempt to combine generalisation with selected detailed information, derived from a number of disparate sources, has on the whole been surmounted." A few queries may, however, be permitted. There is no educational theory behind the rise in the average age of admission to British law schools (p. 83): this is merely the effect of national service. One may question the inclusion of British University law schools among those which aim solely at preparing for the legal professions (p. 86). The fact that a degree in law is not required for entry into the British civil service is surely a different matter. The Oxford B.C.L. is described as "without examination" (p. 92). It is said that no courses on foreign law are given in the training provided for English barristers (p. 99); but what about Hindu, Mohammedan and Roman-Dutch law? To say that British law students are "required" to read a number of books on different subjects is misleading (p. 118). Certain books are usually "recommended" from which the student may select some as a basis for his private reading, though without being confined to books on that list. We should, indeed, have welcomed some account of students' law books, in addition to the American case-and-materials books which are discussed. Professor Eisenmann might have explained, for example, those underlined mimeographed lecture notes sold in the Rue Soufflot, and told us whether this French custom is followed in other civil law countries.

Some doubtful statements about the teaching of law in this country may be due to the fact that the English provincial or civic Universities were not represented among the British rapporteurs. To say that higher degrees for foreign graduates exist only at Cambridge and London (p. 91 n.) is not true, unless "foreign graduates" has some esoteric meaning. Under the heading "Second Cycle" at p. 92, the LL.M. at the English provincial Universities is omitted. The Law Society's School of Law is mentioned on the same page in connection with the one-year period of study for intending solicitors, but the Approved Law Schools in the provinces are overlooked. The account of courses on Comparative Law at pp. 92–100 is not now up to date. In any case, a fair amount of comparative law has been taught for some time under other headings. As regards "Chairs" of Comparative Law, too much should not be made of titles, for how many Chairs of Contract, Tort, Property, Equity, Legal History or Criminal Law are there in this country? There is at least a faint recognition (at p. 113) that the non-residential English Universities have a kind of tutorial system, which in fact they have been developing over the past quarter of a century. Their tutorial classes may average six to eight pupils, but the members of such a group may stimulate each other's minds, whereas the Oxford and Cambridge system is wasteful and depressing if the pupils, who come singly or in pairs, are not good scholars. One consequence of the less highly developed tutorial

system at our non-residential Universities is that the lectures tend to be less formal, and may include questions and discussions. Belfast is not alone in this (*cf.* p. 113 n.).

O. Hood Phillips.

Emmet on Title. Fourteenth edition by J. Gilchrist Smith. Volume I. [London: The Solicitors Law Stationery Society. 1955. xcix and 686 pp. £4 net.]

The criticism of this volume presents two difficulties, one generally applicable to works of this kind, and one peculiar to the work under review. The first arises from the fact that I, at at any rate, have had to base my assessment of the book on a reading of it, while it is in fact designed not to be read, but to be referred to. Features which make it somewhat indigestible as reading matter, for example, a good deal of repetition and constant cross-referencing, are actually merits from the point of view of the practitioner who has occasion to consult it. The second arises from the fact that this is the first of two volumes; many questions of interest and difficulty to the conveyancer are therefore necessarily absent altogether from this volume, and many others are touched on in passing, the reader being referred to the second volume for a further discussion. It may reasonably be asked whether the publication of a work of this kind in two volumes separated by a substantial interval of time is not a drawback from the point of view of the user as well as the reviewer, and whether it might not have been better to withhold the issue of the new edition until both volumes were ready.

Subject to the natural hesitation induced by what is said above, the judgment on the new edition must be a favourable one. It is clear and full and well arranged; where the impression on the mind is less distinct than elsewhere, for example, in the treatment of mistake, and of conditions dealing with error or misstatement in the particulars, the fault lies rather in the subject-matter and the relevant authorities than in the editor's treatment. There is a satisfactory generous measure of reference to periodical literature, though this might perhaps even yet be increased; for instance, the excellent treatment of the transitional provisions as to land held in undivided shares (pp. 363–374) might be supplemented by a reference to Mr. Woodhouse's articles in *The Conveyancer* (o.s.), Vol. 13. Other sections of this volume which deserve special commendation are: the emphasis laid on searches and inquiries before contract, at the beginning of the book (would that some means were available for bringing this to the notice of the lay client); the whole of Chapter 12 on Parties, which contains an immense mass of well digested and arranged learning; the full and careful treatment of the principles governing the implied grant and reservation of easements (pp. 461–469), with its clear and detailed analysis of the relation between the rule in *Wheeldon* v. *Burrows* and section 62 of the Law of Property Act; and the sections on restrictive covenants (pp. 508–531) and the Yorkshire Deeds Registries (pp. 81–586). Apropos of the last, the editor says, quite correctly, that the only result of making land charges registrable in the Ridings Registries has been to necessitate two searches instead of one, but he does not explain why.

Case references are inserted in the body of the text and not relegated to footnotes; whatever the pros and cons in relation to this matter may be in general, I am convinced that the practice adopted is right for this book.

In comparison, the passages giving rise to doubt or criticism are fewer and of less magnitude. Some of these are discussed below, but it is fair to say that in several instances what is here ventilated is not so much criticism or disagreement, as further reflection or questioning aroused by passages in themselves quite unexceptionable. The editor clearly attaches importance to *Hunt* v. *Luck* (pp. 31, 202–203); and no doubt rightly, in view of the

evolving status of the licence as an unregistrable equity (some reference to the mass of recent periodical literature here would not be amiss), not to mention the recent reference to the case by Danckwerts J. in *Goody* v. *Baring* [1956] 2 All E.R. 11. But should this decision ever be cited now without a qualifying reference to section 199 of the Law of Property Act, having regard to the fact that the form of latent equity most likely to emerge, if inquiries are made of the occupants of the premises contracted to be sold, namely, an agreement for a lease, is a registrable land charge? In the absence of more evidence than I am aware of, I cannot agree that a purchaser's right to reinstatement under the Fires Prevention (Metropolis) Act, 1774, is unreliable (p. 38). To speak of "making time of the essence" by notice (p. 107), though convenient and sometimes harmless, is inaccurate, and, especially since the judgment in *Smith* v. *Hamilton* [1951] Ch. 174, such a form of words should be avoided. The phrase "trustees purporting to convey" (p. 140), in the context of the Settled Land Act, is surely wrong. In their capacity as trustees of the settlement, that is exactly what they never do, except perhaps under section 36; if and when they do convey, it is by virtue of being statutory owners or special representatives. The passages on options to purchase in relation to the rule against perpetuities (pp. 75–76), and on the position of a purchaser seeking to rescind, on the ground of innocent misrepresentation, after conveyance (p. 82) are both unduly condensed. To deal only with the second, the problem is surely both too important and too difficult to be dismissed with that most unsatisfactory of devices, "but see the contrary view expressed by Denning L.J. in *Solle* v. *Butcher*." Admittedly the problem is an intractable one, and the view that the observations in question were *obiter* so far as innocent misrepresentation is concerned (if that is, indeed, the view adumbrated in the passage I have quoted) is at least tenable, but I would submit that the practitioner is entitled to rather more by way of guidance.

The editor brings out clearly on p. 378 the irreconcilability of *Re Cugny* and *Re Bridgett and Hayes' Contract* (incidentally there might well be a cross-reference to this passage from the other less satisfactory discussion on p. 181, where the point arises out of one of the specimen abstracts in the Law of Property Act, Schedule VI), and draws the rather natural conclusion that each must govern its own facts. These are, however, further difficulties; where the trustees of the settlement have taken a conveyance under section 36 of the Settled Land Act, is the land still "settled land" and are they still "the trustees of the settlement"? If no, why not? And if so, should there, for example, be a deed of declaration under section 35 when a new trustee is appointed? Perhaps we shall have the views of the editor on this in volume 2. Another settled land point, on which it would be interesting to have the editor's views, arises out of the proviso to section 110 (2) relating to the first post-1925 vesting instrument executed to give effect to a pre-1926 settlement. This is going to become increasingly important now that a post-1925 document can be a root of title under an open contract. The present volume contains on p. 137 the general rule about not going behind the root of title, and on pp. 140–141 the text of the proviso, but does not relate the two. In case of conflict, which prevails? To take an example, which may seem extreme but which has actually arisen in practice, suppose the root of title is a vesting deed dated January 1, 1926; the inference that this is a document within the proviso is inescapable, but can the purchaser insist on being satisfied as to the points on which, under the proviso, he is bound to satisfy himself, seeing that any requisition directed thereto must necessarily go to the earlier title?

The editor says, rightly, that the effect of the A.E.A. superimposed upon sections 5 and 6 of the Mortmain and Charitable Uses Act, 1891, is that land devised to a charity remains vested in the personal representatives of the testator until they assent in favour of the official trustee (p. 263). But even so, we are not out of the wood yet, and it is not a safe assumption that compulsory vesting can be substituted for automatic vesting as a mere change

of machinery without material consequences. What happens if the assent is in fact made in favour of the charity trustees and not of the official trustee? And is it not all rather silly anyway, since the sole purpose of section 6 is to promote a sale, while the only occasion on which the mistake is likely to be discovered is when the charity trustees want to sell, whereupon the purchaser, if wide awake, will object to their title? Not to mention the fact that, even if the correct drill had been gone through, the conduct of the sale would have been in the hands of the charity trustees (subject to any orders from the Charity Commissioners), and the conveyance would have been executed by them in the name of the official trustee (S.L.A., s. 29 (5)). If I seem to labour this point, it is because the Nathan Committee recommended the vesting of all charity land in the official trustee, but did not seem to be clear whether they were proposing automatic vesting or compulsory vesting, still less to have any inkling of the practical consequences of either. But we begin to stray from the purpose of this review, except that it is a sign of a good book on conveyancing that it prompts such questions, and the desire to learn what the author thinks about them.

To conclude with a note on two important, if ancillary matters, the text and the index. The printing and proof-reading seem admirable; even so I have discovered two textual errors—"remission" on p. 121 should presumably read "rescission," and 1904 is a misprint for 1940 on p. 493. The index looks full and good, but broke down once or twice under trial; for example, the question, discussed earlier, about the relation between *Re Bridgett and Hayes' Contract* and *Re Cugny*, which in one form or another crops up several times in this volume, is not traceable under any entry under which I would have expected to find it; neither "personal representatives" nor "trustees of the settlement" yields a clue to the passages referred to.

If the second volume is up to the standard of the first, *Emmet* is secure of a place on the shelves and desks of practitioners for a long time to come.

Denis Browne.

Chitty on Contracts, Twenty-first Edition. Volume 1: General Principles. Edited by Kenneth Scott, m.a., and Bryan Clauson, m.a. With Supplement to September 1, 1955. By Barry Chedlow. Volume 2: Specific Contracts. Edited by Peter Allsop, m.a., Barry Chedlow, Bryan Clauson, m.a., Raoul P. Colinvaux, C. Grunfeld, m.a., ll.b., R. A. MacCrindle, ll.b., Clive M. Schmitthoff, ll.m., ll.d., D. A. L. Smout, m.a., ll.b., ll.m. With Supplement to September 1, 1955. By Barry Chedlow. [London: Sweet & Maxwell, Ltd. 1955. Volume 1: clxiv and 836 pp. Volume 2: cxxxi and 744 pp. £7 15s. net.]

Chitty's Mercantile Contracts. Edited by Barry Chedlow. [London: Sweet & Maxwell, Ltd. 1955. lx and 673 pp. £2 15s. net.]

The appearance of this new edition of *Chitty*, beautifully printed and bound, and divided into two separate volumes of more convenient size, will be generally welcomed as an attempt to preserve the usefulness of a work declining to the status of an ancient monument. The editors' claim to have "carried a stage further" the reform of this work into a modern law book should be read, not as a modest appraisal of their achievement, but as a

statement of editorial policy. Adhering to this policy, they have left intact the order of arrangement which distributes the discussion of mistake over no less than five different chapters, which deals of exception clauses in the chapter on Excuses for Non-Performance, although these clauses are considered almost entirely as raising questions of construction, which are the subject of an earlier chapter.

The possibility of attacking these clauses on the ground of lack of assent is touched on very briefly, there is no mention of the "ticket cases," of *Chapelton* v. *Barry U. D. C.*, or of *Olley* v. *Marlborough Court Hotel.* Nor is there any explanation of the several other methods which have been used to defeat these clauses, as in *Couchman* v. *Hill, Alexander* v. *Railway Executive, Smeaton Hanscomb* v. *Sassoon.* There is again no indication of the problems of general significance in cases involving sales of goods, such as *Wallis* v. *Pratt, Andrews* v. *Singer,* or contracts of affreightment, such as *Glynn* v. *Margetson.* It is true that some of these decisions are discussed in Volume 2, especially in the chapters on Carriage by Land and Air and on Bailments. But the fact that the theory of the "fundamental breach" has been noted in the chapter on Carriage is no excuse for failing to explain it in the statement of general principles; it rather aggravates the fault, since it reveals absence of editorial control and co-ordination, which is underlined by describing as "exception clauses" in Volume 1 what are referred to as "exemptive clauses" in Volume 2, and, indeed, by the general failure to provide cross-references between the two volumes.

Exemption clauses account for a large proportion of litigation on contracts and the failure to give clear and reasonably complete guidance to the available authorities is, therefore, a serious defect in a work intended for practice. Most other developments in the law of contract have been noted accurately, with judicious use of references to periodical literature. But there are occasional lapses of judgment, such as the attempt to dispose of the *Pyrene* case in a note on *Les Affréteurs Réunis* v. *Walford.*

The contents of Volume 2 have been changed extensively. It might be objected that Volume 1 would have been the proper place for the chapter on the Conflict of Laws, and also that agency, bailments and negotiable instruments cannot be correctly classified as specific contracts. But these are merely theoretical objections. For the practitioner it may be more important to know that he is offered no more than an outline of the subjects covered in this volume. It is significant that Dr. Schmitthoff's chapter on the Conflict of Laws is almost identical with the appropriate chapter of his textbook; it is even more significant that the publishers have brought out this volume, without the chapters on Lotteries, Marriage Contracts and Conflict of Laws, as a textbook for students under the title of *Mercantile Contracts.* As a book for students it can be recommended, but practitioners may find more help in works devoted to more detailed treatment of the topics comprised in Volume 2. There are considerable differences, in style and quality, in the thirteen chapters which compose this volume, which is not surprising, as they have been edited by eight different contributors, working, it would seem, in splendid isolation.

The conception of a book on the Law of Contract, divided into general principles and their application to specific contracts, may have been premature in 1826, the year when Chitty on *Contracts* first appeared. But it provided a wonderful opportunity to demonstrate the unifying tendencies which, since that time, have been at work in the field of contract as in relation to the whole of English law. The fact that this opportunity has not been taken must add a note of disappointment to the gratitude of the profession which the editors have earned by the work they have put into the preparation of this edition.

J. UNGER.

Outlines of Industrial Law. By W. Mansfield Cooper, ll.m., of Gray's Inn, Barrister-at-Law. Professor of Industrial and Commercial Law in the University of Manchester. Second Edition. [London: Butterworth & Co. (Publishers), Ltd. 1954. lxi and 378 and (index) 21 pp. 30s. net.]

The second edition of this work displays even more clearly than the first the qualities which mark a successful textbook—accuracy, clarity and readability. It is to be hoped that the learned author's removal to the dignified labours of a vice-chancellor will not delay the publication of the next edition for too long, for in this rapidly developing branch of the law there can be no doubt that it will soon be needed. This is all the more so because for some unfortunate reason the author was unable to incorporate the provisions of the Mines and Quarries Act, 1954, with the result that the relevant pages have a somewhat dated look. In the task of revision attention might also be paid to the account of the *High Trees* case on pp. 31–32 in order to make plain not only precisely what is *ratio decidendi* and what *obiter dictum,* but also the meaning of the phrase (twice repeated) that the decision does not create any new cause of action. In our experience students are very ready to repeat this phrase but very slow to grasp its meaning. Perhaps the most difficult parts of the book are those in which pure statute law on such topics as shops and wages is being expounded. It is not easy to read these pages with undeviating attention and perhaps more might be done to help the reader in the way of italic sub-headings and numbered paragraphs. There is also perhaps rather too much about the early history of the Factory Acts in Chapter 6, interesting though these pages are and helpful as it always is to have an account of the social and economic background to legislation. (There is, in fact, a particularly good brief account of the background to the Workmen's Compensation Acts.) But the comparative insignificance of these criticisms will already have indicated just how good a book this is.

R. F. V. Heuston.

A Manual of the Law of Real Property. By R. E. Megarry, m.a., ll.b. Of Lincoln's Inn, Barrister-at-Law. Second Edition. [London: Stevens & Sons, Ltd. 1955. lii and 646 pp. 37s. 6d. net.]

Mr. Megarry's courage has failed him. He has submitted to those pundits for whom scholarship, even in a book for beginners, does not exist unless it be manifestly seen to exist. And so the plague of footnote and reference has been allowed to spread. The Table of Cases has expanded itself five-fold, though how many of its contents can be read with profit by one who has not already a sound working knowledge of land law and conveyancing is another matter. Let us hope that his readers will accept the author's prefatorial advice to leave the footnotes severely alone. But in the meantime the results of the new policy are all too evident—though one must give due credit to the publishers for their choice of a clumsy, undersized paper. Gone are the firm, clean, attractive lines of youth; in their place is a stodgy, pasty, corpulence which will surely repel those with a taste for books as books as well as those beginners to whom brevity is a source of hope.

A pity. And it would be a tragedy if the beginner allows his judgment to be over-influenced by external appearances. For *Megarry* has won for itself a high place in the student literature of land law, and the new edition, despite its ill-favoured looks, is even better than its predecessor. The original arrangement has been retained—and for this arrangement I am unrepentant

in my dislike—but the treatment of specific topics preserves a balance between principle and detail which is just right for the average student, and the whole exposition is graced by that lucidity of expression which one has come to associate with all the author's writings. Most of the minor infelicities of the first edition have been deftly removed, though why the author's vividly phrased "Wait and See Rule" has been replaced by the vague, anaemic "Timely Vesting Rule" of p. 125 poses a problem. The pundits again? Surely here was no infelicity.

By far the greatest improvement will be found in the author's treatment of statutory developments such as the Rent Acts, the Leasehold Repairs Act, and the legislation relating to agriculture, business premises (from 1927 to 1954) and planning. Perhaps still more might have been included so as to make clearer the policies of the Repairs Act of 1938 and of the improvements sections of the 1927 Act. But with these reservations, it can be said without hesitation that on these topics, and especially on the Rent Acts and the Planning Acts, the new sections, perhaps because they are the most Megarryan, are some of the most valuable in the whole book. They are brilliant exercises in compression and clarity. At last the teacher has a textbook to which, if only on these difficult matters, he can refer his students in the certain knowledge that they will be neither misled by inadequacy of treatment nor overpowered by an excess of detail.

But even here I am compelled to add a note of criticism. Nearly all this expanded matter has been removed to a new chapter, the last in the book, headed "The social control of land." Again it is a question of arrangement. It is not that few students ever read the last chapter of a law book, even to "see how it ends." Nor is it the title, with its spurious mysticism. Is not all land law part of the social control of land? Why, for instance, should the 1927 Act be "social control," but not the medieval doctrine of trade fixtures of which it is a development? Nor is it merely the inartistic dissociation of related topics, such as the separation by over 200 pages of the treatment of "Determination of Leases" from the Rent Acts and the 1954 Act, inconvenient as this undoubtedly is. My criticism strikes deeper. When he is faced with a new development, the first duty of a teacher, I would suggest, is to look at it in the light of his subject as a whole, so that he may present it to his students, or to his readers, as an integral part of a system derived from basic principles. Thus, for example, planning law may be classed as a species of a newly recognised genus—I have elsewhere called it "Public Incumbrances"—of the established family "Incumbrances"; alternatively it may be considered as a limiting factor within the concept "ownership." To treat it solely as a phenomenon of history, as it were to plot against time, is not enough. It must be incorporated into the teacher's analysis of law as it exists here and now. If he merely avoids the issue by relegating it to an appendix, as Mr. Megarry has in effect done, he will inevitably encourage the modern tendency to treat land law as a collection of isolated rules devoid of all organic unity. Such an atmosphere cannot but be unhealthy. It may lead ultimately to the disintegration of the law itself. Herein the influence of the teacher, for good or ill, can be the predominant factor, and his responsibility to the law of the future is correspondingly great. Perhaps Mr. Megarry will consider these things when he is preparing his next edition.

A. D. HARGREAVES.

THE CONFLICT OF LAWS. By PROFESSOR R. H. GRAVESON. Third Edition [London: Sweet & Maxwell, Ltd. 1956. xxiv and 505 pp. 40s. net.]

ALL those who have used past editions of this book, whether for the purposes of learning or teaching, will find that the third edition preserves the same

high standards of presentation, clarity and accuracy which they have observed in earlier editions.

The book has been brought up to date generally, though there are a few omissions, *e.g.*, para. 21 of the Private International Law Committee's First Report; *Harrison* v. *Harrison* [1953] 1 W.L.R. 865; the *Union Corporation Case* [1952] 1 All E.R. 646, as regards residence of companies; the *Assunzione* [1954] 1 All E.R. 278, with regard to Hodson L.J.'s remarks at p. 300 as to the law of the flag; *Re Mitchell* [1954] 2 All E.R. 246, as to caduciary rights; it might have been stated that the *Practice Direction* [1953] 1 W.L.R. 1237, at p. 1240, seems to suggest that a testator must have capacity to make his will according to the law of his domicile at that time. And, since the book is a recommended book for the Law Society's Final, reference might perhaps be made in future editions to the more important of the "conflict" rules of the Non-Contentious Probate Rules, 1954. One might perhaps make a plea for a place in the sun for *Berthiaume* v. *Dastous* [1930] A.C. 79 and *Penhas* v. *Eng* [1953] A.C. 304, which are both excellent "teaching" cases on the formalities of marriage and common law marriages respectively. And might not *Witted* v. *Galbraith* [1893] 1 Q.B. 577 be mentioned in connection with the treatment of R.S.C., Ord. XI, r. 1 (g)? *Huntington* v. *Attrill* [1893] A.C. 150 (p. 37) and *Re Hurll* [1952] 2 All E.R. 322 (p. 163) merit more lengthy treatment. It is not expressly stated whether the Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1955] 3 All E.R. 695 overruled *Inverclyde* v. *Inverclyde* [1931] P. 29.

The latest edition has been enriched by the addition of references to the Law Revision Committee's Report on Domicile, an excellent section on torts committed from the air, and some observations on public policy and quasi-contract. There is, too, a new passage on the recognition of foreign acts of adoption, the value of which will now have to be assessed in the light of *Re Wilby* [1956] 1 All E.R. 27—a case which was reported too late for inclusion.

Professor Graveson is to be congratulated again on producing a .book which is at once succinct and indicative of the more knotty problems for those who wish to delve more deeply into the subject.

P. R. H. Webb.

American-Dutch Private International Law. By Professor R. D. Kollewijn, University of Leiden. Bilateral Studies in Private International Law. Arthur Nussbaum, Editor. No. 3. Columbia University in the City of New York. Parker School of Foreign and Comparative Law. Willis L. M. Reese, Director. 1955. 63 pp. [Distributed by Oceana Publications Inc., 43 West 16th Street, New York 11, N.Y., Price $2.]

Professor Kollewijn's contribution to the "Bilateral Studies in Private International Law" fully maintains the very high standard set by the two earlier essays on American-Swiss and American-French Private International Law which had been written by Professor Nussbaum and Maitre Delaume respectively. The task which presented itself to Professor Kollewijn was different in two important respects from that which his colleagues had faced. No treaty or convention governs the relations between the U.S.A. and the Netherlands in the field of the Conflict of Laws. Furthermore American law on the topics to which the bilateral studies refer has already been dealt with in the two earlier works, with the result that the author could in the main confine himself to a statement of the Dutch rules. This is therefore a work,

which—though small in compass—is of outstanding interest to both practitioners and students in the field of the Conflict of Laws even outside the U.S.A.

Like his colleagues, Professor Kollewijn masters the art of conveying thought in a manner which makes attractive reading without in any way losing in precision. Whether he deals with the strange manner in which the Dutch courts handled the problem of enforcing foreign judgments and differentiated enforcement from mere recognition, or whether he describes the problems of marriages by proxy which are permissible under Dutch law—he always knows how to interest as well as how to instruct. While never failing to be critical of the views of the courts or of other learned writers, he is far removed from taking a conceptionalist view of legal problems. Thus it is of interest to note that he disagrees with the approval given by most Continental scholars to the doctrine according to which recognition of a corporation depends on compliance with the law of the place where the corporation has its seat of administration. It is significant that this theory has never been adopted in a single decision of a Dutch court. The difficulties of locating the actual seat of administration and the frequent necessity of declaring large and flourishing corporations to be void will always make the incorporation test preferable in practice.

The Netherlands are a party to the Treaty on a Uniform Law on the Conflict of Laws concluded at The Hague in 1951 between the four Benelux countries. That treaty is reprinted in a translation in the appendix, and the author has included frequent and elaborate references to it in his work. He says that a new paragraph is intended to be added to the ill-famed article 992 of the Dutch Civil Code, which requires every will of a Dutch citizen to be made in an authenticated form, *i.e.*, before a notary public equivalent in standing to a Dutch notary or before a Dutch consul. According to the new law, no such authentication will be required in the case of a will of a Dutch citizen who either is domiciled abroad at the time of the execution of the will or is "deceased in the place where his will was executed." It seems that those who have to advise Dutch citizens will have to be experts in what Professor J. B. Rhine calls "precognition": how, without such expert knowledge could they know where the testator, whom they are advising, is going to die?

E. J. COHN.

BODIN. SIX BOOKS OF THE COMMONWEALTH. Translated and Selected by M. J. TOOLEY. [Oxford: Basil Blackwell. 212 pp. 15s. net.]

THE *Six Books of the Commonwealth* marks the transition in political thought from the mediaeval preoccupation with the division of powers between Church and State to the modern inquiry into the nature of the State and its institutions. As an "*avocat du roi*" Bodin realised the juridical implications of the political concepts he treated and, moreover, based his views on an empirical and comparative observation of actual institutions rather than on *a priori* arguments from the universal postulates of the Schoolmen. Yet, unlike Machiavelli, he tempered the dictates of convenience with a notion of right founded on divine and natural law. The idea of sovereignty dominates the work. Like Hobbes, personal experience of a period of civil strife and war led Bodin to envisage sovereignty as "absolute and perpetual power vested in the commonwealth"; but, unlike Hobbes, the sovereign is for Bodin subject to the laws of God and of Nature. He is, moreover, bound by reasonable engagements with his own people and other sovereigns which touch and affect their interests. Yet, and here one can see the fruits of personal

experience, neither the breach of these engagements nor the descent into sheer tyranny by the sovereign frees the people from their duty of obedience. Even the perpetuation of a tyranny is preferable to conceding a right of revolt. The same personal experience conditions his approach to the administration of justice; he praises severity rather than leniency in magistrates and justifies collective punishment of a disobedient population. Opposed to this reactionary tendency there are marked traces of a liberalism in advance of his time, for, although law is "nothing else than the command of the sovereign in the exercise of his sovereign power," Bodin realises that affection rather than force makes the best bond between subject and sovereign. He condemns slavery, recognises "natural liberty and the natural right to property" long before Locke or Grotius, and sees in the integrity of the family the main strength of the Commonwealth; he identifies the good of individual and State.

The work concludes with a chapter on Justice, reading like an elusive variant of Book V of the Nichomachean Ethics. In common with Aristotle his concept of justice is analytical and the argument supports the form of analysis rather than the concept of what is right or just. Indeed, the criterion of justice seems more political than legal; it is a variable, depending on the form of government, and the ultimate test is the promotion of the Commonwealth rather than the protection of the rights of liberty and property. It is the promotion of the institutions *per se* rather than the ends for which they stand which is his aim.

The value of the book today lies perhaps more in the thoughts it engenders than in the thoughts it expresses. One is constantly stimulated to comparison and reflection on other writers, other institutions. As an abridged version it is eminently readable and well-developed, omitting the wealth of detail and allusion, and the somewhat ponderous style of the original. It is an edition for which, bearing in mind its price, the publishers are to be congratulated.

D. W. Bowett.

Introduction to English Law. Third Edition. By Philip S. James, M.A., of the Inner Temple, Barrister-at-Law, Professor of Law in the University of Leeds. [London: Butterworth & Co. (Publishers), Ltd. 1955. xxvi and 454 and (index) 28 pp. 15s. net.]

A First Book of English Law. Third Edition. By O. Hood Phillips, M.A., B.C.L., of Gray's Inn, Barrister-at-Law, Dean of the Faculty of Law and Barber Professor of Jurisprudence in the University of Birmingham. [London: Sweet & Maxwell, Ltd. 1955. xxiv and 298 pp. (including the index). 17s. 6d. net.]

These are both third editions of two elementary introductions to English law that have already made their mark in current literature. Professor James's book has been revised admirably and can now claim to be a standard work. The statements in it are short and to the point, qualities that anyone embarking upon a legal career is bound to appreciate. Its main disadvantage is, probably, that it is too precise and definite and might lead to a false sense of knowledge. Doubt and ambiguity can be virtues, but, then, the appeal of this work would not have been as wide as it is now. To give one instance only, in the much expanded chapter on tort, in itself an achievement of compression, the reader has the feeling that he is not given the whole story. Thus in the section on the "scope of employment" (pp. 301–302),

Limpus v. *London General Omnibus Co.* is mentioned as the final authority, yet *Lloyd* v. *Grace* and *Warren* v. *Henleys* modify that principle considerably. But, perhaps, it may be easy to criticise a book on such grounds, as every teacher has his own ideas as to what should be included, without having the author's corresponding responsibility. Professor James has achieved what is rare in elementary books, namely, he has combined learning and clarity of exposition with a deep understanding of the problems of all those students who come new to the law.

It would, perhaps, be superfluous to recommend Professor Hood Phillips's *First Book of English Law.* It has now been brought up to date and the standard of revision is of the highest order. However, little attempt seems to have been made to restrict the number of case references and the practice of including both footnotes and textual references is confusing. Since many editions of this book are likely to follow, the learned author might consider restricting his examples to one case only. For instance, at p. 136, *Amalgamated Society of Railway Servants* v. *Osborne*, *Anderson* v. *Gorrie*, and *Republica de Guatemala* v. *Nunez* could easily be omitted. This is, after all, an elementary book, not a source book for advanced students. However, such mild criticisms of form do not impair the value of this scholarly book which is likely to appeal to the more academically inclined students. Its particular virtue and charm lies not so much in the information that it contains as in the method in which such information is dealt with. By way of comparison, it would be true to say that, whereas Professor James's book is concerned with the answers, Professor Hood Phillips's book deals with the questions. Law teachers who, for some years, have learnt to rely on this book as a first means of acquainting their first-year students with a scholarly way of approaching law will be grateful to Professor Hood Phillips for this latest edition of a book which has become almost a classic.

A. G. CHLOROS.

HATRED, RIDICULE OR CONTEMPT: A BOOK OF LIBEL CASES. By JOSEPH DEAN. [London: Pan Books Ltd. 1955. 251 pp. 2s.]

"HATRED, Ridicule or Contempt," tells the story of forty famous English libel cases, most of them tried in recent years. The book first appeared in 1953 and is now published in a paper-backed edition. The author opens with a brief and instructive *resumé* of the libel law and then plunges into the first of his cases, the trial of Noel Pemberton Billing in 1918 for his accusations that Miss Maud Allen, a well-known actress, and Mr. J. T. Grein, an impressario, were debauching the British public and helping to lose the war by staging two private performances of Oscar Wilde's *Salomé*. The case is chiefly memorable for the fantastic allegations about a "Black Book" in the hands of the German secret service, said to contain the names of 47,000 prominent English men and women, all guilty of practising unnatural and abominable vice. Names mentioned at the trial included not only Mr. Asquith and Lord Haldane but also Mr. Justice Darling, who tried the case! The "Black Book" was never produced and after scenes the like of which have never before or since been enacted in an English court of justice, the perverseness of the jury resulted in a verdict of acquittal. We pass rapidly on to enjoy the spectacle of Lord Alfred Douglas being sentenced to six months' imprisonment for accusing Mr. Churchill of manipulating the communiqués about the battle of Jutland: a spirit from the other world addressing Mr. Justice McCardie in a stentorian bellow during his summing up: the Duchess of Marlborough denying scandalous allegations about her associations with a non-existent clergyman, the Reverend Robertson Page: Prince Youssoupoff confessing to the murder of Rasputin: Aleister Crowley lecturing

the court on the arts of black magic: Horatio Bottomley conducting his last case: and Professor Laski denying that he preached a doctrine of revolution by violence. Even the most tight-fisted must admit that this is good value for two shillings.

Norman St. John-Stevas.

Repertoire of the Practice of the Security Council, 1946–1951. [New York: United Nations; London: H.M.S.O. 1954. xi and 514 pp. 37s. 6d.]

Repertory of Practice of United Nations Organs. Volume 1, Arts. 1–22, xi and 742 pp. 25s.; Volume 2, Arts. 23–54, v and 467 pp. 25s.; Volume 3, Arts. 55–72, v and 596 pp. 25s.; Volume 4, Arts. 73–91, v and 461 pp. 25s.; Volume 5, Arts. 92–111, v and 417 pp. 25s. [New York: United Nations; London: H.M.S.O. 1955.]

All these volumes have been published under special Resolutions of the General Assembly. That relating to the Security Council was directed to assist in "making the evidence of customary international law more readily available" and covers the proceedings of the Council—which it may be presumed is exemplary of State practice, one of the agencies by which international law is determined—from the first meeting on January 17, 1946 to the 569th meeting on December 19, 1951. *The Repertory of Practice* was intended to assist the General Assembly at its tenth session in 1955 to consider whether to call a General Conference to review the Charter, and at the same time to contribute to the knowledge and understanding of the Charter as applied in practice by the various organs of the United Nations.

It has frequently been said that one of the weaknesses of the United Nations lies in public apathy and in the lack of any real knowledge of the Charter and its operation on the part of the "people" in whose name it has been drafted. Students of international institutions will welcome both these publications as enabling them to find their way with relative ease through the paper jungle that has been produced since 1945, and for showing them how practice sometimes modifies, *de facto*, apparently rigid documents—see, *e.g.*, *Repertoire of the Practice of the Security Council*, pp. 170–178, on abstention from voting and absence from meetings by permanent members, and *Repertory*, vol. 1, pp. 65–87 on the same matter. It is doubtful, however, whether volumes of this size and learning will increase public appreciation and knowledge of the Charter.

The compilation of these volumes must have been a herculean task, and it is with some trepidation that one puts forward a suggestion that would have made the burden of compilation heavier or more complicated. There is much to be said, of course, for restricting the discussion of particular articles to the practice of the organ affected by such articles. From the point of view of value, however, it would have been helpful if some method of co-ordinating the practice of the various organs in any one matter had been discovered, even if nothing more than a system of cross-references had been introduced. Reference has already been made to the voting practice in the Security Council where abstention by a permanent member is not regarded as a veto. At the pages cited there is no reference to the reaction of the General Assembly to this practice, nor to the protests made by members of that body to Israel's admission to the United Nations consequent upon the United Kingdom's abstention in the Security Council. Similarly, in the *Repertory*, vol. 1, when reference is made at p. 198 to Security Council abstentions and applications for admission there is no citation of p. 171

which records the General Assembly's action on such a recommendation affecting Israel, nor does p. 171 indicate that there was any opposition in the General Assembly to such action being taken.

The five volumes of the *Repertory* make it possible to analyse the Charter article by article and organ by organ, but unfortunately volume 5 contains no index and it is thus extremely difficult to see whether there is any similarity in the practice of the organs with regard, for example, to such matters as representation, voting and the like.

The Legal Department of the Secretariat has already placed lawyers heavily in its debt with its publications in the United Nations Legislative Series, the present volumes merely increase that burden.

L. C. GREEN.

LAWS CONCERNING NATIONALITY. United Nations Legislative Series. [New York: United Nations; London: H.M.S.O. 1955. xvii and 594 pp. 30s.]

IN March, 1949, the Secretary-General of the United Nations stated in his Memorandum on *Ways and Means of Making the Evidence of Customary International Law More Readily Available* that "there is a growing trend towards an inductive approach" in the study of international law. An inductive approach to international law necessitates emphasis being placed on State practice to an increasing extent and the Division for the Development and Codification of International Law of the Legal Department of the Secretariat has been responsible for a number of volumes in the United Nations Legislative Series, which is designed, according to the Introduction to the present volume, "as a means of making the evidence of customary international law more readily available."

By customary international law States, subject to such minor limitations as have been imposed by customary international law itself or by treaties to which the States are parties, are completely sovereign in the sphere of nationality. *Laws Concerning Nationality* is a compilation of the legislation of eighty-four States, including Western Germany, Korea (South), Laos, the Vatican City, and Viet Nam, together with the legislation of such interesting States as Andorra, Liechtenstein—whose nationality law has recently been examined by the World Court in the *Nottebohm Case*—Monaco, Nepal and San Marino. The United Kingdom is represented by the Nationality Act, 1948, the Burma Independence Act, 1947, the Ireland Act, 1949, the Adoption Act, 1950, and the Orders in Council concerning Protectorates and Protected Persons of 1949 and 1952. In addition there are to be found the relevant statutes for each of the Dominions, including the Pakistan legislation of 1952 which made the Amir of Bahawalpur a national of Pakistan and therefore, by virtue of the British Nationality Act, British, with the result that a British subject may enjoy the immunities of a foreign sovereign in the United Kingdom (*Sayce* v. *Amir of Bahawalpur* [1952] 1 All E.R. 326; [1952] 2 All E.R. 324).

In addition to the municipal legislation the volume also contains the 1930 Hague Convention and Protocols on nationality, together with the relevant sections of the Pan American Conventions. There are also the nationality provisions of the Peace Treaties of 1919–1923 and of the Italian Peace Treaty, 1947, together with the clauses of seven multilateral treaties signed between 1919 and 1950. Finally, there is a list of bilateral conventions on the subject which have been registered with the League of Nations and the United Nations. Surprisingly enough this list consists of only ten treaties registered with the League and two with the United Nations.

For the practitioner in both conflict of laws and international law, particularly when seeking to ascertain the nationality of a claim or the rights of individuals under treaties, commercial or otherwise, the volume will be of

great value. It is a pity that it did not include such United Nations documents as the Convention on Statelessness. To make the value of this compilation even greater it should be supplemented by a collection of Laws and Treaties Concerning Extradition. Political conflicts between States and the facilitation of international travel have made this subject of paramount importance and the Division on Codification would place lawyers even more in its debt if it made such a collection the subject of an early volume in the Legislative Series.

L. C. GREEN.

THE YEAR BOOK OF WORLD AFFAIRS 1955. Published under the auspices of the London Institute of World Affairs. [London: Stevens & Sons, Ltd. 1955. xiii and 392 pp. 42s. net.]

THE *Year Book of World Affairs* usually includes a group of articles on one selected aspect of international relations. The 1955 *Year Book* has articles on the foreign policies of the United States, the Soviet Union and Britain. Professor Hans J. Morgenthau delivers a blistering attack upon the State Department's "foreign policy by hoax," whereby the concoction of dramatic slogans for domestic consumption has served as a substitute for the evolution of constructive ideas. Sir Alvary Gascoyne's lecture on Soviet foreign policy falls below the standard that might reasonably have been expected. Miss Susan Strange's article on British foreign policy, however, is penetrating and thought-provoking. Mr. F. Parkinson, in his survey of the somewhat depressing record of the international conferences of 1954, examines the inter-relationship of the foreign policies of the three Powers.

The remaining articles cover a wide field. Miss H. E. Archdale, in "Lessons of Australian Federalism," considers cases in which the Australian High Court has been obliged to make political value-judgments; her article is useful, but she fails to establish clearly her point that international courts have much to learn from the experience of courts in federal countries in settling political disputes within the framework of law. Dr. F. J. Fowler analyses the technicalities of the Indo-Pakistan water dispute. Dr. Victor Purcell gives expert guidance through the maze of politics in Indo-China. Dr. David Thompson writes attractively on "A New Phase in France," the *annus mirabilis* of Mendès-France; one is inclined to observe *Ex Gallia semper aliquid novi.* Two articles are of exceptional interest—"Soviet Propaganda to the Colonial World," by Dr. Paul Katona, and "Political Aspects of International Drug Control," by Mr. Michael Aaronson. The former, which is particularly well documented, ought to be read by everyone who wishes to appraise the latest trends in Soviet policy in Asia and Africa; the latter is recommended to naive persons who believe that "non-political" international problems are discussed in the United Nations without regard to political considerations. Some readers may consider that another article deserves pride of place—Professor H. A. Smith's philosophical essay on "Modern Weapons and Modern War," in which the author disparages the value of attempts to restrict by agreement the manufacture or use of weapons of destruction until mankind has embraced higher spiritual ideals.

In the Reports on World Affairs that conclude the volume a vast mass of literature is surveyed and commented upon by a team of heroic reviewers.

The 1955 *Year Book* has little to offer the lawyer *qua* lawyer. This is unimportant, for the lawyer who is nothing but a lawyer (if such a creature exists) will never think of opening a yearbook of world affairs.

S. A. DE SMITH.